No. 14-1406

Title:	Nebraska, et al., Petitioners
	v.
	Mitch Parker, et al.
Docketed:	May 29, 2015
Lower Ct.:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(14-1642)
Decision Date:	December 19, 2014
Rehearing Denied:	February 26, 2015

Questions Presented

—Date—	——Proceedings and Orders----------
May 27 2015	Petition for a writ of certiorari filed. (Response due June 29, 2015)
Jun 23 2015	Order extending time to file response to petition to and including July 29, 2015.
Jul 28 2015	Order further extending time to file response to petition to and including August 28, 2015.
Aug 19 2015	Brief of respondents Mitch Parker, et al. in opposition filed.
Sep 1 2015	Reply of petitioners Nebraska, et al. filed. (Distributed)
Sep 2 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Petition GRANTED.
Nov 5 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Tribal Respondents and other members of the Tribal Council.
Nov 5 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for petitioners.
Nov 6 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Nov 16 2015	Joint appendix filed (5 volumes). (Statement of costs filed)
Nov 16 2015	Brief of petitioners Nebraska, et al. filed.
Nov 23 2015	Brief amici curiae of Village of Hobart, Wisconsin, and Pender Public Schools filed.
Nov 23 2015	Brief amicus curiae of Citizens Equal Rights Foundation filed.
Nov 24 2015	SET FOR ARGUMENT on Wednesday, January 20, 2016
Dec 4 2015	Record requested from U.S.C.A. 8th Circuit.
Dec 4 2015	Record received from U.S.D.C. District of Kansas is electronic.
Dec 15 2015	CIRCULATED.
Dec 16 2015	Brief of respondent United States filed. (Distributed)
Dec 16 2015	Brief of Omaha Tribal Council Respondents filed. (Distributed)
Dec 22 2015	Brief amici curiae of Historical and Legal Scholars filed. (Distributed)
Dec 23 2015	Brief amici curiae of National Congress of American Indians, et al. filed. (Distributed)
Jan 4 2016	Motion for divided argument filed by respondents Mitch Parker, et al. out of time.

Jan 8 2016	Motion for divided argument filed out of time by respondents GRANTED.
Jan 13 2016	Reply of petitioners Nebraska, et al. filed. (Distributed)
Jan 20 2016	Argued. For petitioners: James D. Smith, Solicitor General of Nebraska, Lincoln, Neb. For private respondents: Paul D. Clement, Washington, D. C. For federal respondent: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Mar 22 2016	Adjudged to be AFFIRMED. Thomas, J., delivered the opinion for a unanimous Court.
Apr 25 2016	JUDGMENT ISSUED

No. 14-1406

In The Supreme Court of the United States

STATE OF NEBRASKA
AND
VILLAGE OF PENDER, NEBRASKA,

Petitioners,

v.

MITCH PARKER
AND
UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS J. PETERSON
Nebraska Attorney General
BLAKE E. JOHNSON
Assistant Attorney General
Counsel of Record
RYAN S. POST
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
blake.johnson@nebraska.gov
ryan.post@nebraska.gov

Attorneys for the State of Nebraska

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Solem v. Bartlett*, the Court articulated a three-part analysis designed to evaluate whether a surplus land act may have resulted in a diminishment of a federal Indian reservation. *See* 465 U.S. 463, 470-72 (1984). The Court found that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred.

The questions presented by the petition are:

1. Whether ambiguous evidence concerning the first two *Solem* factors necessarily forecloses any possibility that diminishment could be found on a *de facto* basis.

2. Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882.

PARTIES TO THE PROCEEDING

Petitioners are Richard M. Smith, Donna M. Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Kevin Brehmer, and Ron Brinkman ("Individual Petitioners"); the Village of Pender, Nebraska ("Village Petitioner"); and the State of Nebraska ("State Petitioner") (collectively "Petitioners"). The State of Nebraska was Plaintiff-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellant to the Eighth Circuit Court of Appeals.

Respondents are Mitch Parker in his official capacity as Chairman of the Omaha Tribal Council; Barry Webster in his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan in his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris in his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou in his official capacity as member of the Omaha Tribal Council; Eleanor Baxter in her official capacity as member of the Omaha Tribal Council; Ansley Griffin in his official capacity as member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control; and the United States. The United States was Defendant-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellee to the Eighth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
TREATIES AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
I. Establishment of the Omaha Tribe's Reservation	2
II. Sale of the Western Part of the Reservation	3
III. Establishment of the Village of Pender	7
IV. Enforcement of the Beverage Control Ordinance and Subsequent Litigation	8
REASONS FOR GRANTING THE PETITION	10
I. The Analytical Framework	10
II. The Eighth Circuit's Decision	16
CONCLUSION	25

TABLE OF CONTENTS – Continued

Page

PETITION APPENDIX TABLE OF CONTENTS

Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014)....App. 1

Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014).....App. 9

Smith v. Parker, 2015 U.S. App. LEXIS 3054 (8th Cir. 2015).....App. 80

Act of August 7, 1882.....App. 82

TABLE OF AUTHORITIES

Page

CASES

Carpenter v. Shaw, 280 U.S. 363 (1930) 11

DeCoteau v. District County Court, 420 U.S. 425 (1975) 14

Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994) 17, 24

Hagen v. Utah, 510 U.S. 399 (1994) 12, 16, 19, 20

Johnson v. United States, 163 F. 30 (1st Cir. 1908) 11

Mattz v. Arnett, 412 U.S. 481 (1973) 11, 17

Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139 (2d Cir. 2003) 21

Osage Nation v. Irby, 597 F.3d 1117 (2010) 21, 24

Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 24

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 11, 14, 21, 25

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) 17

Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005) 12

Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014) 1

Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014) 1

Smith v. Parker, 2015 U.S. App. LEXIS 3054 (8th Cir. 2015) 1

TABLE OF AUTHORITIES – Continued

Page

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 11

United States v. Celestine, 215 U.S. 278 (1909) 11

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) ..... *passim*

OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska is reported at *Smith v. Parker*, 996 F. Supp. 2d 815 (D. Neb. 2014). The opinion of the United States Court of Appeals for the Eighth Circuit, is reported at *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014) (rehearing *en banc* denied by *Smith v. Parker*, 2015 U.S. App. LEXIS 3054 (8th Cir. 2015)).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on December 19, 2014. The Court of Appeals denied rehearing on February 26, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

Act of August 7, 1882 is set out in the appendix at App. 82.

STATEMENT OF THE CASE

I. Establishment of the Omaha Tribe's Reservation

As the United States expanded westward, the federal government entered into treaties with various Native American Indian tribes for large land cessions, leaving tribes with "reservations" on which they could continue to live under the supervision of the federal government. The Omaha Tribe of Nebraska ("Omaha" or "Tribe") "cede[d] to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel. . . ." under the Treaty of March 16, 1854 ("1854 Treaty"). (App. 19-20). Pursuant to the terms of the 1854 Treaty, the Tribe selected a reservation of 300,000 acres within the ceded area in the Blackbird Creek drainage basin ("Reservation"). (App. 20).

The Omaha entered into another treaty with the United States on March 6, 1865 ("1865 Treaty"), whereby the northern part of the Reservation was ceded to the federal government for fifty-thousand dollars ($50,000.00), which monies were to be expended for the Tribe's benefit, creating the Winnebago Reservation. (App. 20-21). The 1865 Treaty reduced the size of the Reservation to approximately 202,000 acres and ordered the allotment of the land to individual members of the Tribe. (App. 21). By March of 1871, the Tribe's members had received certificates for their allotments. (App. 21). All allotments taken

pursuant to the 1864 Treaty were in the eastern portion of the Reservation. (App. 21).

II. Sale of the Western Part of the Reservation

In August 1871, the Omaha Tribe, through its designated federal agent, began petitioning Congress to enact legislation authorizing the sale of the 50,000 acres comprising the westernmost portion of the Reservation in order to obtain additional financial resources. (App. 22). Although the Tribe's initial efforts were unsuccessful, Congress eventually responded by enacting the Act of June 10, 1872 ("1872 Act"), providing for the separation and sale of 50,000 acres in the western part of the Reservation. (App. 22-23). However, the 1872 Act was largely unsuccessful accomplishing the sale of only 300 acres. (App. 23).

On April 19, 1880, the Omaha Tribe granted the Sioux City and Nebraska Railroad Company a right-of-way through the Reservation ("Railroad right-of-way"), beginning at the northern edge and generally running southward along the Middle and Logan creeks. (App. 20). Around that same period, drafts of what would ultimately become the Act of August 7, 1882 ("1882 Act") were being introduced and debated in Congress. (App. 24-32). The 1882 Act was nearly identical to the Act of 1872, both in its terms and objectives. (App. 24-32). However, the Railroad right-of-way now provided a clear demarcation of the

boundary-line west of which all land would be sold. (App. 26; 29-30; 32).

The 1882 Act directed the conduct of a survey and appraisal before the lands west of the Railroad right-of-way could be opened for settlement and sale. (App. 30-31). As a practical matter, the allotment provisions of the 1882 Act also needed to be carried out before any sale could be affected. (App. 33). The allotment process under the 1882 Act concluded July 11, 1884, with 876 of the approximately 50,000 acres west of the Railroad right-of-way being allotted to the members of the Tribe. (App. 34). With the necessary prerequisites accomplished, the General Land Office opened 50,157 acres west of the Railroad right-of-way for settlement by non-Indians on April 30, 1884. (App. 34).

By 1885, the federal Commissioner of Indian Affairs was reporting that all lands lying west of the Railroad right-of-way had been sold to non-Indian settlers. (App. 34-37). Beginning in 1874, to the extent they reported acreage for the whole Reservation, the Office of Indian Affairs annual reports no longer recorded the 50,000 acres west of the Railroad right-of-way as part of the Omaha Tribe's Reservation. (App. 23; 34-37). Similarly, the Winnebago Agency Annual Statistical Report for 1935 provides the total area of the original Reservation was reduced by 162,504.53 acres in light of three events, listing the sale of 50,157.00 acres of land west of the Railroad right-of-way as one of such events. (App. 37).

The Office of Indian Affairs did not include the land west of the railroad right-of-way as part of the reservation in its reports of 1884, 1888, 1898, 1900, 1906, 1909, or 1911. (App. 36-37). Confirming at the local level what the Commissioner of Indian Affairs had previously indicated, Omaha and Winnebago Agent George Wilson described results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder." (App. 34-35). And in 1901 a "local authority," Indian Agent Charles Mathewson reported, "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and form the southwestern boundary of the Omaha Reservation." (App. 37).

A series of maps of the Omaha Reservation also suggest that diminishment occurred as a result of the 1882 Act. In 1883, a map of Indian reservations, compiled under the direction of Hiram Price, Commissioner of Indian Affairs, indicated that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. In 1888, a new map of Indian reservations was "compiled from official and authentic sources, under the direction of the Hon. JNO. H. Oberly, Commissioner of Indian Affairs." Similarly, an 1892 map of Indian reservations "compiled under the direction of Hon. T.J. Morgan, Commissioner of Indian Affairs," indicated that the

boundaries of the Omaha Reservation did not extend west of the railroad right-of-way.

Congress authorized the Secretary of the Interior, with the consent of the Omaha Tribe, to extend the non-Indian settler's payment period on multiple occasions. (App. 35). The 1888 extension directed the Secretary of the Interior to declare certain purchaser's tracts forfeited due to default on payment. (App. 35). Upon forfeiture, a settler's tract was to be sold at public auction to the highest bidder. (App. 35).

On January 31, 1924, a letter was sent by a delegation from the Omaha Tribe inquiring of the Commissioner for Indian Affairs how much land west of the Railroad right-of-way had been sold, the total amount paid therefor, and whether those monies had been allocated to the Omaha Tribe. (App. 37). The Commissioner's written response only provides that: 1) 50,157.24 acres were opened for homestead entry; 2) that public sales were held in accordance with the terms of the Acts of August 7, 1882, March 3, 1883, and section 3 of the Act of May 15, 1888; and 3) "all the moneys for which the lands were sold have been paid." (App. 37).

Section 8 of the 1882 Act provided that any "residue" lands lying east of the Railroad right-of-way were to be patented to the Tribe in common and held in trust by the federal government. (App. 32). While some of the approximately 800 post-1882 Act allotments were made adjacent to, but east of, the Railroad right-of-way, no new allotments were made west

of that demarcation line. (App. 36). By 1919, all lands allotted to Omaha Tribe members west of the Railroad right-of-way had been patented in fee simple; thus, no trust land remained west of the demarcation line. (App. 36).

III. Establishment of Village of Pender

According to the Commissioner of Indian Affairs report in 1884, non-Indian settlers immediately occupied the land west of the Railroad right-of-way upon its opening. (App. 34). One settler, W.E. Peebles, then engaged in the town of Oakland, Nebraska, decided to dispose of his mercantile interests and purchased a 160-tract of land near the Railroad right-of-way. (App. 38). Peebles deeded a tract to the Railroad to erect a depot and platted a townsite on the remaining acres to found the city of Pender. (App. 38). Lots within the townsite were sold on April 7, 1885. (App. 38). Soon, Pender became the county seat of Thurston County, Nebraska, which encompasses the Omaha and Winnebago Tribe's Reservations. Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the Railroad right-of-way has ranged from 98.18% to 99.95%. (App. 38).

IV. Enforcement of the Beverage Control Ordinance and Subsequent Litigation

On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code, promulgating the Beverage Control Ordinance ("Ordinance"). (App. 16). The Ordinance "govern[s] the sale, possession and distribution of alcohol within the Omaha Tribe's Indian Reservation" by imposing a licensing scheme and a 10% sales tax on the purchase of alcoholic beverages from any licensee. (App. 16). Efforts to enforce the Ordinance against Individual Petitioners began shortly after its promulgation. (App. 17-18).

Individual Petitioners received application forms and requests to remit the ten-percent tax in the mail from the Tribe. (App. 17-18). When no response was forthcoming, the Tribe sent a second notice to Individual Petitioners informing them that they were subject to the Omaha Tribal Code and subject to fines up to $10,000.00 per violation. (App. 18). The United States District Court for the District of Nebraska, pursuant to 28 U.S.C. § 1331, granted Individual Petitioners a temporary restraining order against the enforcement of the Ordinance on April 17, 2007. (App. 18). The District Court stayed further proceedings pending exhaustion of review by the Omaha Tribal Court. (App. 18-19). Individual Petitioners filed an action in the Omaha Tribal Court seeking a declaration as to whether Pender, Nebraska lay within the boundaries of the Omaha Indian Reservation and an injunction against any future enforcement of the

Ordinance. (App. 19). On cross-motions for summary judgment, the Omaha Tribal Court determined that the original boundaries of the Reservation had not been diminished. (App. 19).

Proceedings resumed before the federal District Court wherein *de novo* review was conducted as to the question whether the Omaha Indian Reservation was diminished following the 1882 Act such that Pender, Nebraska was no longer within its borders. (App. 12). State Petitioner intervened making the broader assertion that the Reservation had been diminished as to the *entire* area west of the Railroad right-of-way. (App. 45-47). The United States intervened in support of the Omaha Tribe. (App. 45-47).

The District Court ruled in favor of the Tribe on cross-motions for summary judgment. (App. 77-79). The District Court held that ambiguous evidence regarding the first two *Solem* factors – statutory language and legislative history – necessarily foreclosed any possibility that diminishment would be found on a *de facto* basis. (App. 68; 76). Petitioners appealed to the United States Court of Appeals for the Eighth Circuit. (App. 1). The Eighth Circuit issued a panel opinion on December 14, 2014, affirming the judgment of the District Court. (App. 1-8). The panel determined that the "[district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary

surplus." (App. 7). Petitioners were denied rehearing *en banc*. (App. 80-81).

REASONS FOR GRANTING THE PETITION

The Court has established a "fairly clean analytical structure" to evaluate the potentially diminishing impact surplus land acts of the late 1800's and early 1900's had on the boundaries of federal Indian reservations. The Eighth Circuit's decision presents an apparent conflict with the Court's diminishment jurisprudence insofar as it precludes proper consideration of one of the three factors articulated in *Solem* – the jurisdictional history and subsequent treatment of the area. The failure to properly consider the third *Solem* factor, lead the Eighth Circuit to conclude that the Omaha Tribe's Reservation had not been diminished by the Act of 1882, thus undermining the justifiable expectations of the Pender area residents. The impacts stemming from mistreatment of the third *Solem* factor are not limited to the circumstances experienced in Pender, Nebraska – at least two of the federal Circuit Courts have made the same analytical error in prior decisions not reviewed by this Court.

I. The Analytical Framework

"As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation

boundaries." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984). "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). Accordingly, the "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purposes." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998). Of course, "it is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not." *Solem*, 465 U.S. at 469. "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977). "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Courts are cautioned to follow the general rule that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). However, "we are not free to say to Congress: '[w]e see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Rosebud*, 430 U.S. at 597 (*quoting Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)).

"'Diminishment commonly refers to the reduction in size of a reservation. A finding of diminishment

generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status.'" (App. 12) (*citing Yankton Sioux Tribe v. Gaffey*, 188 F. 3d 1010, 1017 (8th Cir. 1999)). The issue presented to the Eighth Circuit involved the removal of the parcel west of the Railroad right-of-way from reservation status. (App. 3).

"In determining whether a reservation has been diminished, [the Court's] precedents in the area have established a fairly clean analytical structure, directing [courts] to look to *three* factors." *Hagen v. Utah*, 510 U.S. 399, 410-11 (1994) (emphasis added) (*citing Solem*, 465 U.S. at 470). The *Solem* Court articulated the three-part analysis courts use to evaluate whether a surplus land act may have diminished the original boundaries of a federal Indian reservation. *See* 465 U.S. at 470-72 (holding that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant in determining whether diminishment occurred). The doctrine of "*de facto* diminishment" arises from a court's consideration of the third *Solem* factor – events occurring after passage of a surplus land Act. *Id.* at 471-72.

With respect to the first *Solem* factor – statutory language – it has been noted that "[u]ltimately, no magic words are required as prerequisites for finding reservation boundaries have been altered." *Shawnee Tribe v. United States*, 423 F.3d 1204, 1222 (10th Cir. 2005) (*referencing Solem*, 465 U.S. at 471) (finding

that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment."). The Court has observed that the "most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Solem*, 465 U.S. at 470. At the same time, a court's ability rely on express statutory language to discern the intended effect of the Act of 1882 is viewed as limited because

> . . . the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century.

Solem, 465 U.S. at 468.

Indeed, the Court has noted that the diminishment

> . . . inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar . . . [and] Congress assumed that the reservation system would fade over time. Given this expectation, Congress naturally failed to be

> meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

Yankton Sioux Tribe, 522 U.S. at 343 (internal citations omitted).

With respect to the second factor – legislative history – the *Solem* Court explained that

> When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471.

In addition to the potential impact of statutory language and legislative history, the Court considers whether the treatment of the area following the opening of an Indian reservation to non-Indian settlement may result in *de facto* diminishment of the reservation's original boundaries. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 428 (1975); *Rosebud Sioux Tribe*, 430 U.S. at 588 n.3 and 604-05;

Solem, 465 U.S. at 472. *See also Yankton Sioux Tribe*, 522 U.S. at 356-57 (the Court's most recent pronouncement on the diminishment inquiry wherein the possibility of *de facto* diminishment was reasserted in a unanimous opinion).

The nature of *de facto* diminishment is thus described by the Court:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.
>
> In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of the opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.
>
> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.

> Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.

Solem, 465 U.S. at 471-72 n.12 & 13 (internal citations omitted).

Notably, the Court expressly declined a past proposal by the United States Solicitor General to exclude the second and third *Solem* factors and instead rely solely upon a "clear statement rule," instead electing to continue to "examine all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 412. There is nothing in the Court's diminishment jurisprudence which suggests that the third *Solem* factor is without influence when a court is presented with ambiguous evidence concerning the first two factors. Regardless, the Eighth Circuit precluded any meaningful consideration of the third *Solem* factor by limiting its value to the diminishment analysis in a manner that conflicts with the Court's precedent.

II. The Eighth Circuit's Decision

The Eighth Circuit's finding that ambiguity concerning the first two *Solem* factors – statutory language and legislative history – creates a *conclusive presumption of non-diminishment* not subject to

rebuttal by evidence concerning the third *Solem* factor is in apparent conflict with the Court's precedent regarding the potential for *de facto* diminishment. Despite its authority to conduct a *de novo* review of the District Court's findings, the Eighth Circuit adopted wholesale the lower court's analysis simply observing that "any additional analysis would only be unnecessary surplus." (App. 7). However, additional analysis was necessary.

With respect to the first *Solem* factor, the District Court found that the 1882 Act contained neither any hallmark language evincing diminishment or any of the commonly-identified provisions indicating Congress' intent that reservation status *should* be maintained. (App. 55-62); *see, e.g., Mattz*, 412 U.S. at 494 (reserving from settlement tracts upon which any Indian Village currently sits); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354 (1962) (excluding from allotment and settlement land reserved for Indian school, agency, or other purposes); *Solem*, 465 U.S. at 464 (granting authority to reserve land for agency, schools, or religious purposes); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994) (*reserving timber and coal rights in opened land*).

As to the second *Solem* factor – legislative history and the historical context surrounding the passage of the Act of 1882 – the District Court found that "the only thing that can be said with certainty is that Congress understood that the stated purpose of the legislation at issue was 'to sell this land and get it

into cultivation, and the object of the Indians is to get the money and have it put in trust for them here in Washington where they can draw their interest.'" (App. 62-69). This finding reflects the widely-held notion regarding the fate of the reservation system that led Congress to fail "to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Yankton Sioux Tribe*, 522 U.S. at 343. As with the first *Solem* factor, the Eighth Circuit was presented with ambiguous evidence concerning the second factor. (App. 63-64) ("The congressional debate indicates both an intent to 'sell off from this reservation . . . 50,000 acres *in a block* on the western side of it,' but also an intent to honor an existing treaty which allowed 'any Indian to go upon any part of the whole reservation and occupy' the land.") (emphasis in original).

Faced with ambiguity regarding the first two *Solem* factors, the District Court held that because "both the language in the 1882 Act and its legislative history 'fail to provide substantial and compelling evidence of a congressional intention to diminish the Indian lands [it was] bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.'" (App. 68). To be sure, the District Court provided some discussion of the subsequent treatment of the area and pattern of settlement. (App. 69-76). However, the District Court improperly limited the impact of the third *Solem*

factor finding that "*[e]ven if this demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation.*" (App. 76) (emphasis added).

Rather than examining all the circumstances surrounding the opening of the Omaha Tribe's Reservation, first in an effort to discern Congressional intent and then to determine whether a *de facto* diminishment had occurred, the Eighth Circuit improperly created a *conclusive presumption of non-diminishment* in light of the ambiguous evidence regarding statutory language and legislative history. *See Solem*, 465 U.S. at 481 (observing that "[n]either the [Act], the circumstances surrounding its passage, *nor* the subsequent events clearly establish" diminishment). The Eighth Circuit's decision effectively reads the *de facto* diminishment doctrine out of federal jurisprudence.

Proper consideration of the demographic and jurisdictional history of the area west of the Railroad right-of-way necessitates a finding of diminishment. "[A] contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." *Hagen*, 510 U.S. at 421. The Court has explained that the third *Solem* factor is the "least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and *degraded* the "Indian character" of the reservation. . . ." *Yankton Sioux Tribe*, 522 U.S. at 356 (emphasis added). However, the "Indian character" of

the area west of the Railroad right-of-way has *not* gradually diminished over time as has often occurred in other cases where the Court considered the possibility of *de facto* diminishment. *See id.* (observing that "the Yankton population in the region promptly and drastically declined after the 1894 Act . . . [such that] non-Indians constitute two thirds of population.") (emphasis added). *See also Hagen*, 510 U.S. at 421 (observing that the "current population of the area is approximately 85 percent non-Indian."); *Solem*, 465 U.S. at 480 (observing that "[m]ost of the members of the Tribe obtained individual allotments on the lands opened by the Act" and that the "strong tribal presence in the opened area has continued until the present day").

Rather, the record demonstrates that the area west of the Railroad right-of-way *never possessed* any Indian character. According to the Commissioner of Indian Affairs report in 1884, non-Indian settlers "immediately occupied" the land west of the Railroad right-of-way upon its opening. (App. 34-37). Lots in the tract of land dedicated to establish a townsite for the city of Pender were sold on April 7, 1885. (App. 38). Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the Railroad right-of-way has ranged from 98.18% to 99.95%. (App. 38).

Even when "subsequent jurisdictional history is not entirely clear, the single most salient fact is the unquestioned actual assumption of state jurisdiction

over the unallotted lands. . . ." *Rosebud*, 430 U.S. at 675 (internal citation omitted). "The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges." *Id.* at 676. *See also Osage Nation v. Irby*, 597 F.3d 1117, 1127-28 (2010) (*citing Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003) ("'the longstanding assumption of jurisdiction by the State over an area that is [predominately] non-Indian, both in population and in land use, may create justifiable expectations' that 'merit heavy weight.'")).

The present appeal arose from litigation initiated, not by the Omaha Tribe, but by longtime business owners from the Village of Pender who found themselves subject to Tribal taxation for the *first time* in 2006. (App. 17-18). Up until that time, these business owners were licensed by, and subject to the taxation of, the State of Nebraska. (App. 15). In fact, the Tribe's governmental presence in the area west of the Railroad right-of-way has been virtually non-existent. (App. 47-48). Apart from the Tribe's 2006 effort to impose the Beverage Control Ordinance, there is no evidence in the record that the Omaha Tribe has attempted to enforce tribal ordinances west of the Railroad right-of-way. (App. 47-48). Nor has the Tribe

provided any utilities, health care, or social services west of the Railroad right-of-way. (App. 47-48).

The Field Solicitor for the Department of the Interior ("Field Solicitor") issued a formal written opinion on June 27, 1989, addressing the location of the western boundary of the Omaha Tribe's Reservation to facilitate a survey to be conducted by the Bureau of Land Management. (App. 42-43). The Department of the Interior's official position in 1989 was that the Reservation had been diminished to exclude the area west of the Railroad right-of-way. (App. 42-43). Following commencement of legal proceedings below, the Great Plains Regional Director for the Bureau of Indian Affairs requested legal support from the Deputy Solicitor of the Department of the Interior ("Deputy Solicitor"). (App. 42-44). The Deputy Solicitor considered the letter to "implicitly request[ ] reconsideration of the 1989 opinion issued by [the Solicitor's Office]." (App. 42-44). The Deputy Solicitor the revised the Department's opinion citing "recent developments in diminishment jurisprudence" restricted dissemination of the document labeling it "Attorney Work Product." On or about April 16, 2012, the Deputy Solicitor issued a memorandum to the Field Solicitor purporting to withdraw the June 27, 1989 opinion and directing the Field Office to rely upon the revised April 24, 2008 diminishment analysis. (App. 43-44). The U.S. Attorney's Office did not inform the State of Nebraska of this change in position until October 9, 2012, after proceedings had recommenced before the District Court. (App. 45).

The Field Solicitor's original opinion examined the relevant treaties and legislation and evaluated the boundary question in light of the judicial precedent at the time. The Field Solicitor found that "[w]hen compared with the language of other cases dealing with possible diminishment, the Omaha language leads to the conclusion that *on the basis of the language alone* diminishment was not the intent of Congress." (emphasis in original). However, the Field Solicitor found that "the effect of the 1872 Act was at least a de facto diminishment." The Field Solicitor also found that "the Omaha Act of 1882 does not present a good set of facts to argue against de facto diminishment." The Field Solicitor recognized that "the Tribe could certainly claim that the intent of the 1882 Act was to open the reservation for non-Indian settlement but not to diminish it. However, the Court in *Solem* also acknowledges that the de facto diminishment in fact may exist regardless of Congressional intent." The Solicitor went on to conclude that "[f]rom the information currently available to this office, the Omaha situation presents a set of facts from which a court could easily find de facto diminishment." Ultimately, the Field Solicitor concluded that "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned railway right of way."

The Deputy Solicitor explained the Department's earlier position was based on a "less developed administrative file" and the revised opinion was

necessitated by the Court's subsequent holding in *Yankton Sioux Tribe*. However, it is unclear from the revised opinion how the administrative record changed between 1989 and 2008 or how the Court's holding in *Yankton Sioux Tribe* warranted a change in position. Based on the record, it would appear the Department simply revised its longstanding opinion concerning the diminishment of the Reservation to reflect the position it would take in litigation.

The negative effects of the Eighth Circuit's decision have the potential for recurrence in future boundary disputes between sovereign States and federally-recognized Indian tribes. Indeed, this is not the first instance in which the Eighth Circuit has held given improper treatment to the third *Solem* factor under the diminishment analysis. *See Duncan Energy Co.*, 27 F.3d at 1298 ("[w]e find this *exclusive* reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate") (emphasis added). The Tenth Circuit has similarly held that "'subsequent events and demographic history can support and confirm other evidence but cannot stand on their own. . . .'" *Osage Nation*, 597 F.3d at 1122 (*citing Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1396 (10th Cir. 1990)).

The question of how evidence relating to the third *Solem* factor is to be treated is of exceptional importance – not only to the residents of the Pender, Nebraska area but to the relationship among the federally-recognized Indian Tribes and the States.

The Eighth Circuit's decision alters the status quo, undermining the justifiable expectations developed by Pender area residents over more than a century and creating uncertainty and risk for the well-being of citizens of Nebraska and members of the Tribe. Over the last 132 years, the individuals who have chosen to reside in the Pender, Nebraska area and build homes, schools, and churches, open businesses and raise families, have developed justifiable expectations that the area in which they are doing these things was under the jurisdiction of the State of Nebraska.

Viewing the stipulated record as whole, it is difficult to overlook how time has allowed the residents of the Pender, Nebraska area to develop the sort of justifiable expectations the *Rosebud Sioux Tribe* Court was referring to. To create a conclusive presumption of non-diminishment based on ambiguous evidence relating to the first two *Solem* factors precludes meaningful consideration of such expectations. The Court's traditional solicitude for Indian tribes does not require such a result.

CONCLUSION

Petitioners respectfully request that the Court issue a writ of certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted this 27th day of May, 2015.

DOUGLAS J. PETERSON
Nebraska Attorney General
BLAKE E. JOHNSON
Assistant Attorney General
Counsel of Record
RYAN S. POST
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
blake.johnson@nebraska.gov
ryan.post@nebraska.gov

Attorneys for the State of Nebraska

GENE SUMMERLIN
MARNIE JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, Nebraska 68508
(402) 434-8040
gene.summerlin@huschblackwell.com
marnie.jensen@huschblackwell.com
mark.hill@huschblackwell.com

Attorneys for Individual & Village Petitioners

Richard M. Smith; Donna Smith; Doug Schrieber; Susan Schrieber; Rodney A. Heise; Thomas J. Welsh; Jay Lake; Julie Lake; Kevin Brehmer; Ron Brinkman; Village of Pender, Plaintiffs – Appellants State of Nebraska, Intervenor Plaintiff – Appellant v. Mitch Parker, In his official capacity as Chairman of the Omaha Tribal Council; Barry Webster, In his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan, In his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris, In his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou, In his official capacity as Member of the Omaha Tribal Council; Eleanor Baxter, In her official capacity as Member of the Omaha Tribal Council; Ansley Griffin, In his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants – Appellees The United States, Intervenor Defendant – Appellee

No. 14-1642

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

774 F.3d 1166; 2014 U.S. App. LEXIS 23963

October 7, 2014, Submitted
December 19, 2014, Filed

COUNSEL: For Richard M. Smith, Donna Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Kevin Brehmer, Ron Brinkman, Village of Pender, Plaintiffs – Appellants: Mark Davis Hill, HUSCH &

BLACKWELL, Omaha, NE; Marnie Jensen, Gene Summerlin, HUSCH & BLACKWELL, Lincoln, NE.

For State of Nebraska, Intervenor Plaintiff – Appellant: Jon Cumberland Bruning, Attorney General, David D. Cookson, Deputy Assistant Attorney General, Blake E. Johnson, Assistant Attorney General, David A. Lopez, Assistant Attorney General, Ryan Post, Assistant Attorney General, Katherine J. Spohn, Assistant Attorney General, ATTORNEY GENERAL'S OFFICE, Lincoln, NE.

For Mitch Parker, In his official capacity as Chairman of the Omaha Tribal Council, Barry Webster, In his official capacity as Vice-Chairman of the Omaha Tribal Council, Amen Sheridan, In his official capacity as Treasurer of the Omaha Tribal Council, Rodney Morris, In his official capacity as Secretary of the Omaha Tribal Council, Orville Cayou, In his official capacity as Member of the Omaha Tribal Council, Eleanor Baxter, In her official capacity as Member of the Omaha Tribal Council, Ansley Griffin, In his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants – Appellees: Nora Marie Kane, Patricia A. Zieg, STINSON & LEONARD, Omaha, NE; Mark Jon Peterson, PETERSON LAW OFFICE, Omaha, NE.

For The United States, Intervenor Defendant – Appellee: Katherine J. Barton, Daron Carreiro, Mary Gabrielle Sprague, U.S. DEPARTMENT OF JUSTICE,

Environment & Natural Resources Division, Appellate Section, Washington, DC.

JUDGES: Before LOKEN, BEAM, and COLLOTON, Circuit Judges.

OPINION BY: BEAM

OPINION

BEAM, Circuit Judge.

Appellants, the Village of Pender, Nebraska, and resident owners or agents of establishments in or near Pender engaged in the sale of alcoholic beverages, appeal the district court's[1] denial of Appellants' motion for summary judgment requesting declaratory and injunctive relief from the Omaha Tribe's attempt to enforce its liquor-license and tax scheme on them, and the court's corresponding grant of summary judgment in favor of the Omaha Tribe. The Omaha Tribal Court as well as the federal district court determined that Pender and the relevant areas involved in this action are located on Omaha tribal land. Appellants challenge the district court's determination that the Omaha Indian Reservation was not diminished by an 1882 act of Congress. We affirm.

In 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code, which modified the tribe's Beverage Control Ordinance

---

[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

and allowed the tribal government to impose a ten percent sales tax on the purchase of alcohol from any licensee on tribal land. The Omaha Tribe attempted to enforce this alcohol tax on the individual plaintiffs, resulting in this action. Appellants claimed that they were not located within the boundaries of the Omaha Indian Reservation and thus not subject to the tax.

As noted by the district court, the pivotal issue in this case is whether Congress intended to "diminish" the boundaries of the Omaha Indian Reservation in Nebraska when it enacted an 1882 Act that ratified an agreement for the sale of Omaha tribal lands to non-Indian settlers. If it did, the district court stated, "the area involved would no longer constitute Indian country, and the Omaha Tribe could not regulate and tax alcohol sales in Pender, Nebraska." We review de novo a grant of summary judgment. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc).

The extensive legislative history surrounding the 1882 Act is discussed by the district court. Most relevant to the required analysis – the touchstone, really – is language contained in the 1882 Act and the effect it had on the Omaha Indian Reservation, especially an area comprising approximately 50,000 acres that lie in the western portion of the reservation and include the land upon which the Village of Pender now sits. The Act of August 7, 1882, § 1, provided:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

Although not definitive, notably absent from this language is any explicit reference to "cession" combined with "sum certain" payment, both of which have been found "precisely suited to terminating reservation status." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998) (internal quotation omitted). As noted by the parties, § 3 of the 1882 Act did not provide a sum certain to be paid to the Omaha Tribe but, rather,

> the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the

> Treasury of the United States, and shall bear interest [at five percent annually], which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

The district court held that this language did not clearly evince Congress' intent to change boundaries of the Omaha Reservation, but rather "indicates that the United States intended to act as the Omaha Tribe's sales agent for purposes of surveying and auctioning its reservation land . . . with the proceeds held in trust in the United States Treasury for the benefit of members of the Omaha Tribe."

As the district court also highlighted, the historical facts in this action are undisputed and all are relevant to the instant analysis in varying degrees because in this case, while the touchstone of our determination is the congressional purpose expressed through relevant statutory language, we also consider the historical context surrounding the passage of the act(s) at issue, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there. *Yankton Sioux Tribe*, 522 U.S. at 351.

Based on our de novo review, we discern that the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts provided by the Supreme Court as well as this court. These guideposts allow courts, sitting in judgment much later in time, a mechanism to most accurately discern the contemporaneous intent and

understanding of the relevant parties as it pertained to the relevant reservation land in question. *See id.; Hagen v. Utah*, 510 U.S. 399, 421, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994); *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977).

Based upon the record evidence, the district court in this matter has done just that – accurately discerned the contemporaneous intent and understanding of the 1882 Act. The court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus. Ever mindful to "resolve any ambiguities in favor of the Indians," there is nothing in this case to overcome the "presumption in favor of the continued existence" of the Omaha Indian Reservation. *Yankton Sioux Tribe*, 522 U.S. at 344 (quotation omitted); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 991 (8th Cir. 2010) (quotation omitted).

The importance and impact that this determination has on the entire community of Pender and its residents is not lost on this court. As Appellants point out, this is not a matter of mere historical curiosity or academic interest. Yet, as we have stated throughout,

the district court conducted the appropriate analysis and we agree. Accordingly, we therefore affirm for the reasons stated by the district court in its well-reasoned opinion. *See* 8th Cir. R. 47B.

RICHARD M. SMITH, et al., Plaintiffs, and STATE OF NEBRASKA, Plaintiff-Intervenor v. MITCH PARKER, et al., Defendants, and THE UNITED STATES, Defendant-Intervenor.

4:07CV3101

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

996 F. Supp. 2d 815; 2014 U.S. Dist. LEXIS 18605

February 13, 2014, Decided
February 13, 2014, Filed

COUNSEL: For Richard M. Smith, Donna Smith, Doug Schrieber, Susan Schrieber, Rodney A Heise, Thomas J Welsh, Jay Lake, Julie Lake, Keith Brehmer, Ron Brinkman, Village of Pender, Plaintiffs: Mark D. Hill, LEAD ATTORNEY, HUSCH, BLACKWELL LAW FIRM – OMAHA, Omaha, NE; V. Gene Summerlin, Jr., LEAD ATTORNEY, Lincoln, NE.

For State of Nebraska, Intervenor Plaintiff: David D. Cookson, David A. Lopez, Jon C. Bruning, Katherine J. Spohn, Ryan S. Post, LEAD ATTORNEYS, ATTORNEY GENERAL'S OFFICE – NEBRASKA, Lincoln, NE.

For Mitch Parker, In his official capacity as Chairman of the Omaha Tribal Council, Barry Webster, In his official capacity as Vice-Chairman of the Omaha Tribal Council, Amen Sheridan, In his official capacity as Treasurer of the Omaha Tribal Council, Rodney Morris, In his official capacity as Secretary of the Omaha Tribal Council, Eleanor Baxter, In her official

capacity as Member of the Omaha Tribal Council, Ansley Griffin, In his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants: Mark J. Peterson, Nora M. Kane, Patricia A. Zieg, LEAD ATTORNESY, STINSON, LEONARD LAW FIRM – NEBRASKA, Omaha, NE.

For United States, Intervenor Defendant: Daron Carreiro, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE – ENVIRONMENTAL ENFORCEMENT, Washington, DC.

JUDGES: Richard G. Kopf, Senior United States District Judge.

OPINION BY: Richard G. Kopf

OPINION

MEMORANDUM AND ORDER

The plaintiffs are owners or agents of businesses and clubs in Pender, Nebraska, that sell alcoholic beverages. They have sued Omaha Tribal Council members in their official capacities for prospective injunctive and declaratory relief from the Omaha Tribe's attempt to enforce its liquor-license and tax scheme on the plaintiffs. The plaintiffs claim that because they are not located on a federally recognized

Indian reservation or in "Indian country,"[1] they are not subject to the Omaha Tribe's jurisdiction, and the defendants have therefore exceeded their authority under 18 U.S.C. § 1161[2] and under federal common law by trying to exercise tribal jurisdiction over the plaintiffs. The plaintiff-intervenor, the State of Nebraska, alleges that the Omaha Tribe has exceeded its tribal authority under federal common law by attempting to enforce its liquor-license and tax scheme against the retailers in Pender, but also requests a permanent injunction prohibiting the Omaha Indian Tribe from asserting any tribal jurisdiction whatsoever within all 50,157 acres of Thurston County, Nebraska, lying west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad – in other words, the State's challenge is not limited to

---

[1] "Indian country" is defined in 18 U.S.C. § 1151 to mean: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] The plaintiff's complaint alleges that 18 U.S.C. § 1161 permits the Omaha Tribe to regulate liquor sales on its reservation land and in "Indian country."

Pender, Nebraska. (Filing 107, Complaint-in-Intervention of Intervenor State of Nebraska.)[3]

This matter is before the court on cross-motions for summary judgment (Filings 113 & 116) after a lengthy stay[4] to allow the plaintiffs to exhaust their remedies in the Omaha Tribal Court. The pivotal issue in this case is whether Congress intended to "diminish"[5] the boundaries of the Omaha Indian

---

[3] The defendant-intervenor, the United States, claims that Pender, Nebraska, is located within the boundaries of the Omaha Tribe's reservation and that such boundaries have not been reduced or diminished. (Filing 109, Answer of Intervenor-Defendant United States to Plaintiffs' Second Amended Complaint.)

[4] This case was stayed on October 4, 2007 (Filing 53), and the judgment of the Omaha Tribal Court was filed in this court on March 4, 2013. (Filing 86.)

[5] The term "diminishment" was discussed and clarified in *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 815 n.3 (8th Cir. 1983):

> For the sake of clarity, we note that the question whether the boundaries of an Indian reservation, as drawn when the reservation was established, are redrawn after part of that reservation has been opened for settlement, has been expressed in several different ways by various courts. The process has been called disestablishment (referring to the disestablishment of the original reservation boundaries); diminishment (referring to a diminishing or shrinking of the original boundaries); termination of reservation status (if the original boundaries are redrawn, the reservation status of the land is no longer within the boundaries and thus is terminated); and a change of boundaries.

See also Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1017 (8th Cir. 1999) ("[D]iminishment commonly refers to the reduction in

(Continued on following page)

Reservation in Nebraska when it enacted an 1882 Act that ratified an agreement for the sale of Omaha tribal lands to non-Indian settlers. If Congress intended to diminish the Omaha Reservation, the area involved would no longer constitute Indian country, and the Omaha Tribe could not regulate and tax alcohol sales in Pender, Nebraska. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) ("An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land.").

I. STANDARD OF REVIEW

After litigants have exhausted their remedies in tribal court, the federal district court "should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard. The Tribal Court's determinations of federal law should be reviewed *de novo* while determinations of Tribal law should be accorded more deference." *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (citations omitted) (discussing district court's review of tribal court's determination of its own jurisdiction).

The parties agree that the ultimate issue in this case – whether the Omaha Indian Reservation was

---

size of a reservation. A finding of diminishment generally suggests that a discrete, easily identifiable parcel of land has been removed from reservation status." (internal citations omitted)).

diminished by an 1882 act of Congress – is a question of federal law and, therefore, is subject to this court's *de novo* consideration. (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF pp. 31-37 (arguing that tribal court's decision has no legal effect, but "[e]ven if the Court engages in traditional judicial review, a *de novo* standard applies"); Filing 138, Defs.' Br. Opp'n Pls.' Mot. Summ. J. at CM/ECF pp. 15-17 ("the ultimate question of whether the Omaha Indian Reservation was diminished is subject to this Court's *de novo* review").)

II. UNDISPUTED MATERIAL FACTS[6]

A. Parties[7]

1. The Village of Pender, Nebraska, ("Pender") is a village as defined by Neb. Rev. Stat. § 17-201

---

[6] I previously ordered (Filings 110 & 130) that this matter shall be resolved solely on the evidentiary record established before the tribal court, along with the parties' joint stipulation of facts (Filing 100), exhibits attached to the State of Nebraska's complaint (Filing 107), Exhibit B to the United States' index in support of its motion to intervene (Filing 106-3), and additional maps filed by the State of Nebraska (Filings 123-2, 123-3, 123-4) and by the defendants in rebuttal (Filings 123-5, 123-6, 123-7, 123-8, 123-9). The parties have also agreed to additional facts in the course of briefing their motions for summary judgment. (Filing 138 at CM/ECF pp. 5-15; Filing 118 at CM/ECF pp. 8-9, 11-17, 21-23, 25-28, 31.)

[7] Unless otherwise indicated, the following facts are undisputed and appear in the parties' joint stipulation of facts (Filing 100) or are characterized as admitted in the parties' briefing (Filing 138 at CM/ECF pp. 5-15).

with a population of approximately 1,300 residents in northeastern Nebraska, and is a plaintiff in this litigation. Pender is a political subdivision of the State of Nebraska, the county seat of Thurston County, and is governed by a Village Board of Trustees.

2. The remaining plaintiffs are and were at all relevant times residents of Thurston County and owners of or agents for establishments engaged in the sale of alcoholic beverages in or near Pender, Nebraska. Each of the plaintiffs holds a valid liquor license from the State of Nebraska and has fully complied with all of Nebraska's requirements to engage in the retail sale of alcohol.

3. The Omaha Tribe of Nebraska is a federally recognized Indian Tribe organized and chartered under the Indian Reorganization Act of 1934. Indian Entities Recognized and Eligible to Receive Services from U.S. Bureau of Indian Fairs Notice, 75 Fed. Reg. 60810 (Oct. 1, 2010). Defendants are or were at all relevant times members or officials of the Omaha Tribal Council.

4. The plaintiffs' primary customers are not members of the Omaha Tribe, but rather nonmember residents of Pender and the surrounding areas. None of the plaintiffs are members of the Omaha Tribe, parties to any contracts with the Omaha Tribe, or involved in any other formal business relationship with the Tribe. Finally, none of the plaintiffs have applied for a license or remitted any taxes to the Omaha

Tribe under the "Beverage Control Ordinance," discussed below.

B. The Beverage Control Ordinance License and Tax Structure

5. On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code. (Amendment (Title 8 of the Tribal Code) to Omaha Tribe's Beverage Control Ordinance, 71 Fed. Reg. 10056 (Feb. 28, 2006) (the ordinance, as amended, is hereinafter referred to as the "Beverage Control Ordinance").

6. The purpose of the Beverage Control Ordinance "is to govern the sale, possession and distribution of alcohol within the Omaha Tribe's Indian Reservation." The Beverage Control Ordinance requires establishments that sell alcohol to obtain a license for a fee that varies by license class and imposes a 10-percent sales tax on the purchase of alcohol from any licensee.

7 The licensing scheme contained within the Beverage Control Ordinance introduces three classes of liquor licenses – A, B, and C. Class A licenses are issued to "Package Dealers" and require a $1,000.00 application fee; Class B licenses are issued to "On-Sale Dealers" and require a $1,500.00 application fee; and Class C licenses are issued to "Wholesalers" and require a $500.00 application fee. Each license is valid for one year, but may be extended for an additional 30 days, provided that a new license

application is pending at the time of expiration. The Beverage Control Ordinance also institutes a 10-percent sales tax to be levied on the retail price of all sales of alcoholic beverages. The 10-percent sales tax must be remitted to the Omaha Tribe.

8. Any entity applying for a license under the Beverage Control Ordinance must also grant unlimited access to its books and premises to the Omaha Tribe. The Beverage Control Ordinance states: "[An applicant's] premises, for the purpose of search and seizure laws shall be considered public premises, and that such premises and all buildings, safes, cabinets, lockers, and store rooms thereon will at all times on demand of the Tribal Council or a duly appointed Tribal or Federal policeman, be open to inspection."

9. Non-tribal members who fail to comply with the licensing and taxing scheme imposed by the Beverage Control Ordinance are subject to administrative fines in the amount of $10,000.00 per violation.

C. Enforcement of the Beverage Control Ordinance

10. The Omaha Tribe has attempted to enforce the Beverage Control Ordinance against the individual plaintiffs. In particular, on December 19, 2006, plaintiff Richard M. Smith, owner of a convenience store in Pender that has sold alcoholic beverages for the last 38 years, received a letter from the Omaha Tribe. The letter included an application to obtain a liquor license from the Omaha Tribe for his convenience

store, Smitty City West, and a request to remit the 10-percent alcohol tax imposed by the Beverage Control Ordinance on a monthly basis. Smith did not take any action in response to the December 19, 2006, letter because he believed that his business was not located within the Omaha Indian Reservation, nor was he affiliated with the Omaha Tribe.

11. On or about January 31, 2007, the plaintiffs received a Second Notice from the Omaha Tribe via registered mail. The Second Notice was addressed to "all manufacturers, importers, wholesalers, and retailers of alcoholic beverages within the Omaha Indian Reservation." This notice informed the plaintiffs that "the Omaha Tribe's Director of Liquor Control has determined that [they] are subject to the requirements of the Alcoholic Beverage Control Title." The Second Notice also stated that because the plaintiffs were not in compliance with the Beverage Control Ordinance, they were subject to fines of up to $10,000.00 per violation. The Second Notice threatened "enforcement actions in Omaha Tribal Court."

12. On April 17, 2007, the United States District Court for the District of Nebraska granted the plaintiffs a temporary restraining order prohibiting the enforcement of the Beverage Control Ordinance in Pender, Nebraska, and that order was later extended by a stipulation of the parties. (Filings 16 & 29.)

13. On October 4, 2007, the United States District Court for the District of Nebraska stayed the

original proceeding in order for the plaintiffs to exhaust any potential remedies available in the Omaha Tribal Court. (Filing 53.)

14. On January 7, 2008, the plaintiffs filed an action in the Omaha Tribal Court seeking a judgment declaring that Pender is not within the boundaries of the Omaha Reservation and an injunction prohibiting the enforcement of the Beverage Control Ordinance in Pender. In those proceedings, the plaintiffs retained Emily Greenwald, Ph.D., as their expert witness to prepare a historical report. Defendants retained R. David Edmunds, Ph.D., Watson Professor of American History for the University of Texas at Dallas, as their expert witness to prepare a historical report.

15. On February 4, 2013, pursuant to cross-motions for summary judgment, the Omaha Tribal Court determined that Congress did not "intend[ ] to diminish the boundaries of the Omaha Indian Reservation" in the applicable 1882 Act, which is discussed in detail below. (Filings 82-1 & 86.) Stipulating that exhaustion was complete, the parties returned to this court for resolution of this matter.

D. The 1854 Treaty

16. In 1854, the Omaha Tribe entered into a treaty with the United States government in which the Tribe agreed to "cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the

main channel of said Missouri River due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line[.]" (Filing 115-2, at CM/ECF p. 2.)

17. In consideration of and payment for the land ceded by the Omaha Tribe, the United States agreed to pay the Omaha Tribe a sum certain paid over a certain number of years.

18. In the Treaty of 1854, the Omaha Indians also made a commitment to allow railroads to construct a right-of-way across their reservation at some point in the future, and in 1880, they agreed to grant the Sioux City and Nebraska Railroad a right-of-way from the northern edge of their reservation generally southeastward until it crossed the southern boundary of the Omaha Indian Reservation.

19. As a result of the 1854 Treaty, the actual boundaries of the Omaha Reservation were set in 1855, and the original size of the Omaha Reservation was approximately 300,000 acres. Pender is within the original boundaries of the Omaha Reservation as established in 1855.

E. 1865 Omaha Land Sale: Winnebago Reservation

20. On March 6, 1865, the Omaha Tribe entered into a treaty with the United States government under which the Tribe agreed to "cede, sell, and

convey to the United States" a portion of the Omaha Reservation for the sum certain of $50,000.00 for the establishment of the Winnebago Reservation. (Filing 115-3 at CM/ECF p. 2.)

21. The size of the Winnebago Reservation created by the 1865 Treaty was approximately 98,000 acres, leaving the Omaha Reservation with approximately 202,000 acres. The General Land Office ("GLO") conducted a survey of the remaining Omaha Reservation from 1866 to 1867 which was approved by the GLO Commissioner in 1867.

22. The 1865 Treaty provided for the allotment of the remaining portion of the Omaha Reservation to individual Omaha Tribe members and also provided that the Omaha Tribe was to "vacate and give possession of the lands ceded by this treaty immediately after its ratification."

23. In March 1871, the Omaha received certificates for their individual allotments, all of which were in the eastern half of the Omaha Reservation. The Omaha Tribe members later learned that the certificates they were given for the allotments provided in the 1854 and 1865 Treaties did not provide fee-simple title to the land, causing the Omaha Tribe to request allotments that would guarantee fee-simple title to the reservation land so allotted.

F. The 1872 Act Regarding the Western Portion of the Omaha Reservation

24. In August 1871, the Omaha chiefs appealed to Congress "to provide for the enactment of a law authorizing the sale of 50,000 acres of the most western portion of their reservation . . . " to raise funds for farming and housing. Congress did not enact the requested legislation.

25. In October 1871, the Omaha chiefs sent a letter to Congress and "earnestly renew[ed] the petition presented to Congress at its last session" calling for "the sale of near 50,000 acres from the most western portion of our reservation as can be separated from the remainder by a line running along the section-lines from north to south."

26. On January 22, 1872, Commissioner of Indian Affairs F.A. Walker recommended the proposed legislation to Congress and stated, "I believe that the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy."

27. On June 10, 1872, Congress enacted legislation that authorized the Secretary of the Interior, with the consent and concurrence of the Omaha Tribe, to "cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south. The

said lands so separated shall be appraised. . . . [and] the Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale for cash in hand." The 1872 Act also contained provisions allowing other Indian tribes to sell portions of their reservation lands.

28. Only 300.72 acres of the Omaha Reservation were actually sold under the terms of the 1872 Act. The Commissioner reported: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve."

G. 1873 Ponca Agreement Regarding the Western Portion of the Omaha Reservation

29. On November 6, 1873, the Omaha and Ponca chiefs signed a resolution to sell a portion of the Omaha Reservation to the Ponca Tribe. Both tribes wished to settle the Ponca on the western part of the Omaha Reservation surveyed and appraised for sale in 1872.

30. The sale of land from the Omahas to the Poncas was never completed.

H. 1874 Omaha Land Sale: Wisconsin Winnebagoes

31. In 1874, following the Omaha's unsuccessful attempt to sell land to the Poncas, Congress appropriated funds to purchase additional land from the Omaha Tribe for the Wisconsin Winnebagoes from the eastern part of the Omaha Reservation. The amount of land sold to the Wisconsin Winnebagos was reported as 12,374.53 acres.

I. 1880 Proposal Regarding the Western Portion of the Omaha Reservation

32. In 1880, Nebraska Senator Alvin Saunders again offered a bill to accomplish the sale of 50,000 acres from the western portion of the Omaha Reservation first proposed as part of the 1872 Act. In support of this effort, Senator Saunders stated: "The bill provides for a survey and sale of fifty thousand acres. There was a bill passed some eight years ago [the 1872 Act] authorizing the sale of this land, and only about three hundred acres of land were sold under it. The Secretary now recommends that we deduct that from this bill so that the survey may stand as it is, 49,461.71 acres instead of fifty thousand acres."

33. Later in the debate, Senator Saunders explained why the 1872 Act was unsuccessful: "Let me state the reason for it. A bill was passed some seven or eight years ago authorizing it to be sold in smaller tracts, but people would not go and settle around the

Indians when they could get lands as cheap or cheaper off a distance from them. The object now is that we may get, if possible, persons to emigrate in colonies and go and make their own settlements where they will not be isolated from society."

34. Senator Saunders went on to state: "The Indians want the land sold . . . [T]hey want this money put out at interest so that they can have the interest to use in improving their farms. They are very desirous to have the land sold. They even would have it sold at a lower figure than this bill names if it cannot be sold at that."

35. Senator Saunders' 1880 proposal did not advance.

J. 1882 Act Regarding the Western Portion of the Omaha Reservation

36. On February 20, 1882, the Senate introduced Senate Bill 1255, which provided for the sale of up to 50,000 acres from the western portion of the Omaha Reservation.

37. During the first floor debate on this bill, Senator Saunders stated: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed. The Indians want it passed so as to put the money derived from the sale on interest. The white people are there ready to buy the land and put it in cultivation." In support of the bill, Senator Saunders read a letter into the record

stating: "[T]here are no Indians living on the western portion of the Omaha Reservation; that no land has been allotted to any of them so far as I can ascertain; and furthermore [ ] there are no improvements such as housing, fencing[ ] upon the 50,000 acres of land alluded to in your letter." Senator Saunders also stated: "Twice they have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold."

38. Senator Saunders explained that the 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." He went on to state that under the bill, "[t]he lands that [the tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished."

39. Specific to the land west of the right-of-way, Senator Saunders explained that the Omahas did not want to live in the area to be sold. "I do not think an acre of this land will be sold to the Indians . . . ," and "I did not think as a matter of fact a single acre of land [west of the right-of-way] would go into the hands of Indians." Senator Saunders' belief was consistent with the report submitted by the local agent which stated, "there are no Indians living on the western portion of the Omaha reservation."

40. Senator Dawes reported, "Last summer I saw the representatives of this tribe, and I heard them myself state . . . they were very anxious to sell a portion of their real estate and obtain the money, so that the interest of the money they could use for the improvement of the residue of their property. They had more land than they could occupy, as I heard them myself."

41. Senator Dawes explained, "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation, as much as, if all the Indians should take in severalty, would give each one a farm and have some left for such increase of numbers as might probably be expected in the next twenty-five years; that there was no apprehension on the part of the Department; they were satisfied."

42. On April 20, 1882, the Senate passed the bill and referred it to the House Committee on Indian Affairs. On July 1, 1882, the House committee offered a substitute bill that authorized both the sale of land and allotment in severalty to the Omaha Tribe.

43. On July 26, 1882, Representative Dudley Haskell explained that before the western portion of the Omaha Reservation would be sold,

> they are at liberty to make their individual selections of one hundred and sixty acres to

> every head of family, eighty acres to every widow, and forty to every child. These severalty selections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to be issued in fee-simple. All the lands not allotted are to be patented under the broad seal of the United States to the tribe in common, so as to give them an absolute indefeasible title to about 100,000 [sic] acres.

44. On July 26, 1882, Representative Edward Valentine of Nebraska stated: "These Indians I know very well, and they are anxious to sell this portion of the reserve and have allotments made to them in severalty of the remainder. It is at their request, as I have stated, that the bill was drawn . . . "

45. On July 16, 1882, Representative Valentine also stated:

> I desire to say there is now a law [the 1872 Act] authorizing the Secretary of the Interior to sell 50,000 acres of that land. It embraces all the land mentioned in this bill and some other land in addition; and that land may be sold indiscriminately to any persons. It may be sold to persons not expecting to become actual settlers. After this railroad was built through there[,] the Indians then asked that he sell no land under the law as it now exists, and made their petitions for a bill of this character, the one which is now pending before the House, and

which was framed in accordance with their wishes.

46. Representative Valentine further explained:

> You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law[,] it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

47. Finally, while specifically discussing the provision to allow Indians to select allotments west of the railroad right-of-way prior to the lands opening, Senator Valentine stated, "They do not care about making selections over on that side of the road at all."

48. On July 27, 1882, the House approved S. 1255, as amended, to provide for both the grant of allotments to Omaha Tribe members from either the east or west portions of the Omaha Reservation, as

well as the sale of the remaining portion of the reservation west of the railroad right-of-way to white settlers.

49. Although initially referred back to committee by the Senate, the Senate withdrew its opposition to the House amendment to S. 1255.

50. On August 7, 1882, President Chester Arthur signed the bill into law. The Act of August 7, 1882, 22 Stat. 341, distinguished between treatment of "that portion of their reservation . . . lying west of the right of way," *id.* §§ 1-4, and "lands lying east of the right of way," *id.* §§ 5-8. As to land situated west of the right-of-way, the Act of 1882 provided:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

(Act of August 7, 1882, 22 Stat. 341 § 1.) After the survey and appraisal, the law authorized the Secretary of the Interior to issue a proclamation that "unallotted lands are open for settlement . . . ":

> That after the survey and appraisements of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act . . .

(*Id.* at § 2.)

51. The 1882 Act did not provide a sum certain to be paid to the Omaha Tribe for land sold, but stated:

> That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act,

> including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

(*Id.* at § 3.)

52. As to land east of the right-of-way, the 1882 Act authorized the Secretary of the Interior to allot lands "in severalty to the Indians" in certain quantities, and to patent such land to the Omaha Tribe allottees in trust for 25 years. After the 25-year trust period, fee patents would issue "to said Indian or his heirs." Similarly, the "residue" of land lying east of the right-of-way not allotted were to be patented to the Omaha Tribe, with the United States holding such land in trust for the sole use and benefit of the Omaha Tribe for 25 years, after which fee patents would issue to the Omaha Tribe. *Id.* §§ 5, 6, 8.

53. The last sentence of section 8 of the 1882 Act refers to land both east *and* west of the right-of-way, providing "[t]hat said Indians . . . may . . . select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way . . .*" *Id.* § 8 (emphasis added).

K. Implementation of the 1882 Act

54. In April 1883, the Secretary of the Interior appointed Alice Fletcher as a special agent to oversee the allotment process. Fletcher urged the Omahas to select land near the railroad right-of-way because she considered this the best agricultural land, and it also afforded rail access to markets. While some of the Omahas accepted Fletcher's advice, most preferred the eastern part of the reservation for its access to water and timber.

55. In April 1883, Commissioner of Indian Affairs Hiram Price wrote to Fletcher, directing her to "please ascertain whether any of the Indians desire to make their selections west of the right-of-way of the Sioux City and Nebraska Railroad Company. It is important that their wishes in that respect be made known at once in order that the appraisement of the lands lying west of the railroad may be proceeded with, if deemed desirable, without waiting for the completion of the allotments. . . ."

56. Section 8 of the 1882 Act allowed the Omaha Tribe members to take their allotments anywhere on the reservation, including west of the railroad right-of-way. Commissioner of Indian Affairs Hiram Price addressed this provision in his 1882 annual report:

> By section 8 of the act the Indians are permitted, if they shall so elect, to select allotments within the tract designated to be sold, and while it is not thought that there are any who desire to make selections there,

> it might be well to ascertain their intentions in that respect, so that if there be any such they may make their selections and have them approved before the appraisement is begun.

(Greenwald Report, p. 15, n.69 citing ARCIA 1882, *LXVII.*) At the end of 1883, Commissioner Price reported that 10 to 15 allotments had been taken west of the railroad right-of-way, and 876 of the approximately 50,000 acres west of the railroad right-of-way had been allotted to Omaha Tribe members. Indian allotments either wholly or partially west of the railroad right-of-way taken by members of the Omaha Indian Tribe represented less than two percent of the total acreage west of the right-of-way. (Decl. of Emily Greenwald ¶ 3.)

57. Upon completion of the initial allotment process, and on April 30, 1884, 50,157 acres west of the railroad right-of-way were opened for settlement by non-Indians, and "the major portion thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." (Greenwald Report, p. 22, n.105 quoting Report of the Commissioner of the General Land Office, 28, in Report of the Secretary of the Interior, vol. I, H.exdoc. 1, part 5, 48th Cong., 2d sess., 1884, serial 2286.)

58. In 1885, Omaha and Winnebago Agent George Wilson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City

and Omaha Railroad, to actual settlers, and have taken allotments on the remainder."

59. In 1885, the Commissioner of Indian Affairs reported that "Omaha Reservation lands lying west of the Sioux City and Nebraska Railroad" had recently been sold to settlers, but that many of the latter had failed to pay for the acreages.

60. In 1887, the Secretary of the Department of the Interior referred to land west of the railroad right-of-way as "within the limits of the former Omaha Indian Reservation."

61. Congress authorized extensions of payment under the 1882 Act in 1885, 1886, 1888, 1890, and 1894. The 1894 extension of payment provided that "this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained[.]" Further, non-Indian settlers on the reservation lands west of the railroad also requested the Omaha Tribe's acquiescence in the payment extensions. Federal officials agreed to the request, and on December 23, 1895, the Omaha met in council with Indian Agent William Beck and gave their permission for payment schedules for reservation lands west of the railroad to be extended.

62. Under the terms of the 1888 extension, if a settler defaulted on payment for land west of the right-of-way, the land was to be sold at public auction rather than revert back to the Omaha Tribe. The proceeds from any sale of the land continued to inure for the benefit of the Omaha Tribe.

63. Congressional reports focusing upon this extension also refer to the land as being "on the Omaha Reservation" or individuals buying lands west of the railroad as "purchasers of land of the Omaha tribe."

64. In 1900, Secretary of Interior Ethan Allen Hitchcock ruled that settlers who purchased land west of the railroad right-of-way were not subject to homestead legislation because they were settled on lands "in the Omaha reservation."

65. All of the land west of the railroad right-of-way, apart from the 10 to 15 Indian allotments, was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913.

66. The land allotted to Indians west of the right-of-way was patented in fee simple by 1919, with no trust land remaining west of the railroad.

67. The Office of Indian Affairs ("OIA") reports of 1884 and 1888 did not include the land west of the railroad right-of-way as part of the reservation, listing the size of the Omaha Reservation as 142,345 acres.

68. The OIA report of 1898 did not include the land west of the railroad right-of-way as part of the reservation, listing the size of the Omaha Reservation as 142,344.63 acres.

69. The OIA report of 1900 did not include the land west of the railroad right-of-way as part of the reservation's total acreage, listing the size of the

Omaha Reservation as 142,344.79 total allotted and unallotted acres.

70. In 1901, Indian Agent Charles Mathewson reported, "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and forms the southwestern boundary of the Omaha Reservation."

71. In 1906 and 1909, the OIA's report did not include the land west of the railroad right-of-way as part of the reservation, listing 141,891 total allotted and unallotted acres.

72. In 1911, OIA's report did not include the land west of the railroad right-of-way as part of the reservation, listing 135,022 total allotted and unallotted acres.

73. In 1924, two Omaha tribal delegates inquired into the 1882 land sales regarding the amount of land sold, its value, the amount of interest due, and whether the Tribe had been paid for the value of land and interest.

74. In 1924, the Commissioner of the General Land Office reported: "Public sales have accordingly been held and all the moneys for which the lands were sold have been paid."

75. The 1935 Annual Statistical Report for the Winnebago Agency listed three "reductions" to the original acreage of the Omaha Reservation, including the "[s]ale of land west of railroad, 50,157 acres."

L. Establishment and Population of the Village of Pender

76. Upon the opening of the area west of the right-of-way, W.E. Peebles purchased a tract of 160 acres, on which he platted the townsite for Pender, Nebraska. He conveyed a portion of the land to the railroad for a depot site. Lots within the town went on sale in April 1885.

77. Since the early twentieth century, Indians have comprised less than two percent of the population west of the right-of-way.

78. Many Omahas regularly visited Pender, resided in the village, and conducted business there. Excerpts from the correspondence and diary of Rosalie Farley, whose allotments were located west of the railroad, indicate that her family resided on her allotment, and that she and other Omahas regularly visited Pender, conducted business at that location, and attended concerts in the village.

79. Between 1890 and 1895, Thomas Sloan, an attorney and member of the Omaha Tribe, maintained both a residence and a law office in the Village of Pender, where he employed an Omaha as a clerical assistant. Sloan also served as Mayor of the Village of Pender, Thurston County Surveyor, and Justice of the Peace.

80. Hiram Chase, another attorney and enrolled member of the Omaha Tribe, resided and practiced law in Pender, where his children attended public

schools. Chase also served as Thurston County Attorney for eight years before being elected as a county judge.

81. In *Hallowell v. United States*, 221 U.S. 317, 319-20, 31 S. Ct. 587, 55 L. Ed. 750 (1911), the United States Supreme Court restated the parties' stipulation of facts relied upon by the district court as follows:

> That the Omaha Indians exercise the rights of citizenship, and participate in the County and State Government extending over said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County government, extending over the reservation, and have held the following offices in said county of Thurston, State of Nebraska: County Coroner, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election Officers, and have also served as jurors in the county and district Courts. Defendant is self-supporting, as are most of said Indians. Some of them are engaged in business and most of them engaged in farming.

M. Other Determinations Regarding the Disputed Territory

82. In 1889, the Nebraska Legislature enacted legislation defining the geographical boundaries of Thurston County – now codified as Neb. Rev. Stat. § 22-187. By 1922, the legislature had changed the boundaries of Thurston County, as reflected below. New language as of 1922 is highlighted in bold font and excluded 1889 language is stricken through:

> **The territory bounded as follows shall constitute the county of Thurston:** Commencing at **a point where the west boundary of the Omaha Indian reservation intersects the south line of section thirty-three (33),** ~~the southeast corner of section thirty-four (34),~~ township twenty-five, (25), north, of range five, **(5)** east, ~~sixth P.M.~~; **6th principal meridian**; thence east to the northeast corner of township twenty-four, (24), north, of range seven (7), east ~~sixth P.M;~~ thence south to the south line of the Omaha Indian reservation, as originally surveyed; thence east along said line to the **line between sections thirty-two and thirty-three,** ~~southeast corner of section twenty-eight (28),~~ township twenty-four (24), north, of range ten (10), east ~~sixth P.M.;~~ thence north to the northwest corner of section twenty-one (21), township twenty-four, (24) north, of range ten (10) east sixth P.M.; thence east to the eastern boundary of the State of Nebraska; thence in a northwesterly direction along said boundary line

to its intersection with the section **north** line **of the Winnebago Indian reservation,** ~~dividing sections twenty-five (25) and thirty-six (36),~~ township twenty-seven (27), north, of range nine, (9), ~~east sixth P.M.~~; thence west **along the north line of said reservation to the intersection of the line between sections thirty-three and** ~~north-west corner section~~ thirty-four, ~~(34)~~ township twenty-seven (27), north, range six (6), east sixth ~~P.M.~~; thence south to the south-west corner of section thirty-four, (34), township twenty-seven, (27), north, range six (6), east ~~sixth P.M.~~; thence west to **an intersection with the west boundary of said Winnebago Indian reservation;** ~~the northwest corner of section two (2), township twenty-six (26), north, of range five (5), east sixth principal meridian;~~ thence south **along the Winnebago and Omaha Indian reservation line** to the place of beginning.

(Filing 100, Joint Stipulation of Facts (comparing Compiled Statutes of Nebraska 1889, chapter 17, § 75b with Compiled Statutes of Nebraska 1922, chapter 13, § 804).)

83. In November 1961, the Winnebago Agency issued a "Historical Summary for Omaha Reservation," which stated that boundaries of the Omaha Reservation had been delineated in the original survey of 1855 and were only diminished by two sales of land to the United States for the benefit of the Winnebagos. According to the "Summary," these "two statutory cessions . . . are the only changes effected in

the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them."

84. On April 16, 1969, the legislature on behalf of the State of Nebraska voted to retrocede to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, except for offenses involving operation of motor vehicles on public roads or highways.

85. The United States government, through the Secretary of the Interior, accepted the retrocession of jurisdiction on October 25, 1970. *See* 35 Fed. Reg. 16598 (1970). The legal description of the land in the Notice of Acceptance of Retrocession of Jurisdiction delineates the Omaha Indian Reservation as originally surveyed.

86. From 2007 until sometime immediately prior to expert depositions in this case (August 7-8, 2012), the Thurston County website declared: "The two reservations [the Omaha Indian and Winnebago] are still in existence today and cover the entire Thurston County area."

87. In 1989, the Office of the Solicitor of the United States Department of the Interior was asked by the Bureau of Indian Affairs to locate the western boundary of the Omaha Indian Reservation. The Department of Interior reviewed "each of the treaties

or legislative acts effecting [sic] the reservation" boundary and stated that the land west of the railroad right-of-way "appears to have lost its Indian character long ago with the arrival of non-Indian homesteaders." The Department of Interior concluded "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way . . [U]nder the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for settlement."

88. The 1989 Department of the Interior opinion incorrectly stated that no "Indian trust allotments were made on lands lying west of the Sioux City and Nebraska Railroad right-of-way." The allotment map shows that there were at least 10 to 15 allotments taken by Omaha Tribe members which were either wholly or partially west of the railroad right-of-way following the passage of the 1882 Act.

89. The 1989 Department of the Interior opinion was officially withdrawn on April 16, 2012, by Patrice H. Kunesh, Deputy Solicitor for Indian Affairs in the United States' Solicitor's Office in Washington, in a letter to Priscilla Wilfahrt, Twin Cities Field Solicitor. Kunesh's letter to Wilfahrt stated:

> I have reviewed your letter of April 24, 2008, to the Great Plains Regional Director of the Bureau of Indian Affairs, which concludes that the boundaries of the Omaha Indian Reservation have not been diminished. The April 24, 2008 letter supersedes your

> Office's letter of June 27, 1989, to the Great Plains Regional Director regarding 'Survey of Western Boundary of Omaha Reservation.'
>
> The June 27, 1989 letter is hereby withdrawn and not to be relied upon or used by your office.

(Filing 120-54.) The Department of the Interior, the Office of the Solicitor in Washington, D.C., the Field Solicitor's Office in Minnesota, and the Winnebago Agency in Nebraska have been instructed to rely upon the April 24, 2008, Wilfahrt letter.[8]

---

[8] he April 24, 2008, 27-page Wilfahrt letter concluded:

> [S]ince diminishment is not to be lightly inferred and a reservation retains it[s] status no matter what happens to the title of individual[] plots of land within the area until Congress explicitly indicates otherwise, a plain reading of the treaties and statutory language involving the Omaha Indian Reservation does not evidence a diminishment of the reservation boundaries. Our review of the documentation of legislative history and urrounding circumstances which is available in the record does not show a contemporaneous understanding that the reservation would be diminished and in accordance with *Yankton*, leads us to conclude that our 1989 opinion should be revisited.

Wilfahrt also recommended further factual development of the administrative record, without which she was unable to "make any broader conclusions." (Filing 120-55, at CM/ECF p. 26 (Letter from Field Solicitor

(Continued on following page)

90. Deborah R. Gilg, United States Attorney for the District of Nebraska, sent a letter dated October 9, 2012, to Nebraska Governor David Heineman, informing him of the United States Department of Justice's position "that the [Omaha Indian] reservation has not been diminished" and the Department of Justice "intends to assert the same federal jurisdiction in Pender that we routinely exercise in other parts of 'Indian Country'." (Filing 107, Complaint in Intervention of State of Nebraska, Ex. 1.)

91. On August 22, 2000, the Thurston County District Court determined that the land west of the railroad right-of-way is not a part of the Omaha Reservation. On February 15, 2007, the Nebraska Attorney General issued an opinion which also concluded that the land west of the railroad right-of-way was not a part of the Omaha Reservation.

N. Intervention of State of Nebraska and United States

92. After issuance of the Tribal Court's opinion in the case now before this court concluding that Congress did not "intend[ ] to diminish the boundaries of the Omaha Indian Reservation" in the applicable 1882 Act, Rodney Morris, Chairman of the Omaha Tribe of Nebraska, sent a letter dated February 12, 2013, to Douglas A. Ewald, Tax Commissioner of the

---

Priscilla Wilfahrt to Acting Director of Bureau of Indian Affairs Alice Harwood (Apr. 24, 2008)).)

Nebraska Department of Revenue. The letter purported to respond to the Department of Revenue's prior letter stating that it "would cease sharing fuel tax revenue from retailers in Pender as of March 1, 2007" based on the February 15, 2007, Nebraska Attorney General's opinion concluding that property west of the right-of-way described in the 1882 Act should not be considered part of the Omaha Indian Reservation. Based on the Tribal Court's contrary decision that the 1882 Act did not diminish the boundary of the reservation, leaving the original boundary intact, the letter demanded "that the Nebraska Department of Revenue forward the tribal share of the fuel tax revenue attributable to retailers located west of the referenced right-of-way from March 1, 2007 to the present" and that such retailers should be included "in future fuel tax calculations." (Filing 107, Complaint in Intervention of State of Nebraska, Ex. 2.)

93. Because the "Tribe's request for money from the State obviously implicates a direct interest of the State which hinges on a resolution of the substantive issue in this case" – that is, whether the 1882 Act of Congress diminished the boundary of the Omaha Indian Reservation – I allowed the State of Nebraska, as Plaintiff-Intervenor, to file a Complaint in Intervention in this matter to challenge the Tribe's jurisdiction over approximately 50,157 acres of Thurston County, Nebraska, lying west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad, as that term is defined in the 1882 Act of Congress.

This area includes the Village of Pender, but also areas lying beyond Pender's municipal boundaries. Like the plaintiffs, the State of Nebraska claims that the Omaha Tribe has exceeded its authority under federal common law. (Filings 102 & 107.)

94. I also allowed the United States to intervene in this matter as Defendant-Intervenor. (Filing 108.) The United States has filed an Answer to Plaintiffs' Second Amended Complaint, asserting as affirmative defenses that Plaintiffs' claims are barred because Pender and Plaintiffs' businesses are located within the boundaries of the Omaha Reservation, as established by the Treaties of 1854 and 1865, and because those boundaries have not been reduced or diminished by the Act of 1882 or otherwise. (Filing 109.)

O. Treatment of the Disputed Territory by the Tribe

95. Tribal authorities enforce the following portions of the Omaha Tribal Code east of the right-of-way, but not west of the right-of-way: Title 7 (fire protection); Title 9 (animal control); Title 14 (fireworks); Title 15 (wildlife and parks); Title 35 (business permits); and Title 36 (business licenses).

96. The Omaha Tribe does not offer foster care or medical, welfare, or child protective services west of the right-of-way. The Omaha Tribe does not have an office and does not operate a school, industry, or business west of the right-of-way. No tribal celebrations

or ceremonies take place west of the right-of-way. The Omaha Tribe does not conduct governmental or ceremonial activities west of the right-of-way and has no mineral rights or other claims to land west of the right-of-way.

P. Other Activity Related to the Omaha Reservation Boundaries

97. On March 6, 1992, the Nebraska State Tax Commissioner issued a Revenue Ruling stating that the Village of Pender, among others, is located within the boundaries of the Omaha Indian Reservation.

98. In 2002 and 2003, the Omaha Tribe contacted the Nebraska Department of Roads requesting replacement of signs delineating the location of the boundaries of the Omaha Indian Reservation. The signs had been removed at the direction of state officials due to a dispute over the location of the western boundary of the Omaha Indian Reservation.

99. Beginning on October 1, 2005, the Omaha Tribe and the State of Nebraska entered into an Agreement for the Collection and Dissemination of Motor Fuel Taxes between those parties on sales of motor fuel made on the Omaha Reservation.

100. Former Omaha Tribal attorney Maurice Johnson testified regarding various efforts made by the Omaha Tribe throughout his tenure as counsel relating to its presence in the western region of the Omaha Tribe of Nebraska Reservation and, in

particular, near or within the Village of Pender. Mr. Johnson testified that in his opinion, for the most part, the Tribe's efforts were met with anger and hostility and at least one instance of overt racism. For example, in approximately 2003, the Tribe received a federal grant relating to roads. A requirement of the grant was the exercise of traffic safety checks in order to determine whether people were wearing seatbelts. There was opposition from the Pender community and, specifically, the Pender police, who challenged the Tribe's authority to administer the safety checks.

101. In 2003, Mark Casey, the Highway Superintendent of the Thurston County Road Department, contacted the Nebraska Department of Roads and requested that the state road map of Nebraska be redrawn. Casey stated that "the latest BIA maps that are in my possession show the original boundary of the Reservation and include a notation 'Omaha Treaty Boundary of March 10, 1854.'" Casey requested that the boundary be changed "particularly in the area around Pender" due to a "District Court decision [*State v. Picotte*] of August 22, 2000, Case No. CR 00-6. . . ."

102. Although all orders entered in *State v. Picotte* by the District Court of Thurston County, with no involvement by the Omaha Tribe, have no legal impact on the Omaha Reservation, state cartographers again redrew the western borders of the reservation, creating an altered map that moved the western boundary of the Omaha Reservation to a new location just east of Pender. The state cartographers

then extended the Omaha Reservation's western boundary to the junction of State Highways 94 and 9 (north of Pender), with State Highway 9 as the western border of the reservation until this highway passed into the Winnebago Reservation. This new delineation of reservation boundaries placed the Village of Pender outside of the reservation's borders.

103. In or around the summer of 2007, officials from the Environmental Protection Agency, Region 7 in Kansas City ("EPA"), visited Pender to publicly discuss the Omaha Tribe administering federal regulations on pesticide and fungicide control on the Omaha Tribe Reservation, including Pender. The meeting, which was of a "town hall" variety, was very heated. Two statements made by persons in opposition to the EPA's involvement were anti-Native American, such as "We're not going to have Indians telling us how to farm," and "How about if I change my name to 'Spotted Eagle,' can I then tell white people how to farm their land?"

104. In 2007, Ms. Teri Lamplot, while she was Chair of the County Board of Supervisors for Thurston County, asked the U.S. Census Bureau to revise the boundaries of the Omaha Indian Reservation to place Pender outside of the Omaha Indian Reservation. In response to Ms. Lamplot, Robert LaMacchia, the Chief of the Geography Division of the U.S. Census Bureau, informed Ms. Lamplot that the Census Bureau was "unable to make the changes to our database" and would continue to rely upon the 1999 BIA map which indicated that Pender fell

within the western boundary of the Omaha Indian Reservation and stated, "While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no new legal opinion, federal court decision, Act of Congress, etc., has altered these boundaries."

105. Finally, efforts were made to cross-deputize police officers among the Tribe, the Thurston County Sheriff, and the Nebraska State Patrol to facilitate law enforcement on the reservation by defining policing relationships, delineating powers, and encouraging cooperation. Thurston County refused to join any cross-deputization efforts despite the willingness of the Nebraska State Patrol to participate in such an agreement. Although cross-deputization did occur with the State Highway Patrol and with the Walthill Police Department, Thurston County did not participate.

106. In approximately October of 2011, tribal member Thomas Saunsoci was arrested and charged with a probation violation in the County Court of Thurston County, Nebraska. Mr. Saunsoci was held in custody in the Thurston County Jail in Pender with the condition that he could not be released until he paid a bond. A close personal friend of Mr. Saunsoci came to the Thurston County Jail in Pender with a sufficient amount of money to bail him out. The jailer said that Thurston County could not accept the money without Mr. Saunsoci's signature appearing on a document called a "Waiver of Extradition."

III. ANALYSIS

"Indian reservation lands are owned by the United States and held in trust for the benefit of specific tribes or bands." *United States v. Jackson*, 697 F.3d 670, 672 (8th Cir. 2012). In this case, I must decide whether Congress's Act of August 7, 1882, 22 Stat. 341,, (the "1882 Act") diminished the boundaries of the Omaha Indian Reservation, or whether the Act simply permitted non-Indians to settle within existing Omaha Reservation boundaries.

"Congressional action removing certain reservation land from Indian ownership does not necessarily disestablish reservation boundaries. Disestablishment occurs only when Congress intends to create a smaller reservation with adjusted boundaries. It does not occur if Congress only intended to remove from Indian control certain land within the reservation boundaries while retaining its original exterior boundaries." *Lower Brule Sioux Tribe*, 711 F.2d at 815 (internal citations omitted). "The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation." *City of New Town v. United States*, 454 F.2d 121, 125 (8th Cir. 1972); *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977) ("The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status.").

"[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984). Diminishment "will not be lightly inferred" because Congress must "clearly evince an intent to change boundaries before diminishment will be found." *Id.* (internal quotation and citation omitted). Without clear congressional intent to disestablish a reservation, the reservation remains because "'[o]nce a block of land is set aside for an Indian Reservation . . . [it] retains its reservation status until Congress explicitly indicates otherwise.'" *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 991 (8th Cir. 2010) (quoting *Solem*, 465 U.S. at 470). "'[T]here is a presumption in favor of the continued existence of a reservation.'" *Yankton Sioux Tribe*, 606 F.3d at 991 (quoting *Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010)).

The Supreme Court has "established a fairly clean analytical structure"[9] for determining whether

---

[9] This analytical structure is derived from several Supreme Court cases. As summarized by the Eighth Circuit Court of Appeals in *United States v. Jackson*, 697 F.3d at 672 (parallel citations omitted):

> In modern times, the Supreme Court has decided seven cases raising the question whether various surplus lands Acts diminished or entirely terminated particular reservations. In three cases, the answer was no. *Solem v. Bartlett*, 465 U.S. 463, 481, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984); *Mattz* [*v. Arnett*], 412 U.S. [481, 506, 93 S. Ct. 2245, 37 L. Ed. 2d 92 [(1973)]; *Seymour v. Supt. of Wash. State Pen.*, 368

(Continued on following page)

an Indian reservation has been diminished. "To determine whether a reservation has been diminished, we examine three factors: the statutory language, the historical context, and the population that settled the land. Of the three factors, the statutory language is the most probative. Throughout the inquiry, ambiguities are to be resolved in favor of the Indians, and diminishment should not be found lightly." *Duncan Energy*, 27 F.3d at 1297 (citations omitted); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998) (most probative evidence of diminishment is statutory language used to open Indian lands; however, court will also consider "the historical context surrounding the passage of the surplus land Acts, and, to a lesser extent, the subsequent treatment of the area in question and the pattern of settlement there") (internal quotation and citation omitted).

If an act and its legislative history fail to "provide substantial and compelling evidence of a congressional intention to diminish Indian lands," the court is "bound by [its] traditional solicitude for the Indian

---

U.S. 351, 356, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962). In the other four, including the most recent two, the answer was yes. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 358, 118 S. Ct. 789, 139 L. Ed. 2d 773 (1998); *Hagen* [*v. Utah*], 510 U.S. 399, 421, 114 S. Ct. 958, 127 L. Ed. 2d 252 [(1994)]; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 614-15, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 445, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472.

A. Statutory Language

"Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unalloted opened lands," *Solem*, 465 U.S. at 470, and "cession," combined with "sum certain" language, is "'precisely suited' to terminating reservation status." *Yankton Sioux Tribe*, 522 U.S. at 344. Specifically,

> when a surplus land Act contains both explicit language of cession, evidencing "the present and total surrender of all tribal interests," and a provision for a fixed-sum payment, representing "an unconditional commitment from Congress to compensate the Indian tribe for its opened land," a "nearly conclusive," or "almost insurmountable," presumption of diminishment arises.

Id. (quoting *Solem*, 465 U.S. at 470 and *Hagen v. Utah*, 510 U.S. 399, 411, 114 S. Ct. 958, 127 L. Ed. 2d 252 (1994)); *see also United States v. Jackson*, 697 F.3d at 675 ("When a surplus lands Act provides that a Tribe cedes its entire interest in land to the United States for a sum certain, 'a nearly conclusive, or almost insurmountable, presumption of diminishment arises.'" (quoting *Yankton Sioux Tribe*, 522 U.S. at 344)). However, while statutory language requiring a

fixed-sum payment "can certainly provide additional evidence of diminishment, the lack of such a provision does not lead to the contrary conclusion," *Hagen*, 510 U.S. at 412, and language of cession and unconditional compensation "are not prerequisites for a finding of diminishment." *Solem*, 465 U.S. at 471.

In analyzing statutory language for evidence of diminishment, a court should focus on terms and language contained in the *operative* portion of the act at issue because it "is the relevant point of reference for the diminishment inquiry." *Hagen*, 510 U.S. at 413 (statute's reference to "public domain" dispositive if act "restores" lands to "public domain" in the "operative language of the statute opening the reservation lands for settlement"). The Supreme Court has cautioned that "although the statutory language must 'establis[h] an express congressional purpose to diminish,' *Solem*, 465 U.S., at 475, 104 S. Ct., at 1168-1169, we have never required any particular form of words before finding diminishment." *Hagen*, 510 U.S. at 411.

The plaintiffs admit that the most probative factor to be examined in a diminishment inquiry – statutory language – does not work in their favor, acknowledging that "the express language of the 1882 Act does not incorporate terms which the [United States Supreme] Court has previously determined to be clear evidence of Congressional intent to diminish." (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF p. 41.)

I agree. The language of the 1882 Act does not provide for cession, relinquishment, conveyance, or surrender of all rights, title, or interest to the Omaha Tribe's land in exchange for a specific sum of money; does not restore lands to the public domain; and does not require the Tribe to vacate their reservation land. Rather, the Act states that land west of the right-of-way could "be surveyed, if necessary, and sold" and, after survey and "appraisement," could be proclaimed by the Secretary of the Interior as "open for settlement." Proceeds of the sales were to be "placed to the credit of said Indians in the Treasury of the United States," and income was to "be annually expended for the benefit of said Indians." Further, Article 8 of the 1882 Act allows "Indians . . . [to] select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way*," suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation. (Emphasis added.)

In the late 1800s, "Congress was fully aware of the means by which termination could be effected," as evidenced by numerous bills that were introduced during that time frame that expressly terminated Indian reservations in unequivocal terms. *Mattz v. Arnett*, 412 U.S. 481, 504-05, 93 S. Ct. 2245, 37 L. Ed. 2d 92 & n.22 (1973) (stating that Congress knew how to expressly terminate reservation land when desired by using language such as "reservation is hereby discontinued," "a portion of the . . Indian Reservation . . . be, and is hereby, vacated and

restored to the public domain," and "the reservation lines of the . . . Indian reservations be, and the same are hereby, abolished"). When such language is not employed, the court will not be "inclined to infer an intent to terminate the reservation." *Mattz*, 412 U.S. at 504 (finding no diminishment when act provided that reservation was "hereby declared to be subject to settlement, entry, and purchase under the laws . . . granting homestead rights and authorizing the sale of . . . lands," with proceeds of land sales to "constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands"; finding reference in act and legislative history to reservation in past tense insufficient to infer clear intent to diminish reservation).

Further, the difference between the 1882 Act and the Omaha Treaties of 1854 and 1865 is "particularly illuminating." *Duncan Energy*, 27 F.3d at 1297. In the Omaha Treaties of 1854 and 1865, the Tribe expressly agreed to "cede, sell, and convey" land to the United States and "relinquish . . . all claims" thereto in exchange for fixed sums of money, demonstrating that both Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so. (Filing 115-2, 1854 Treaty ("The Omaha Indians cede to the United States" and "relinquish to the United States all claims" in exchange for specific sums of money); Filing 115-3, 1865 Treaty ("The Omaha tribe of Indians do hereby cede, sell, and convey to the United States a tract of land" and "the United States

agree to pay to the said Omaha tribe of Indians the sum of fifty thousand dollars"). This treaty language is substantially different from that employed in the 1882 Act.

The Eighth Circuit Court of Appeals addressed a similar scenario in *Duncan Energy*, 27 F.3d at 1297, where the court compared an 1891 treaty in which an Indian tribe agreed to "cede, sell, and relinquish to the United States all their right, title, and interest in" a portion of its reservation and referred to the "diminished Reservation" with a 1910 allotment statute that merely authorized the Secretary of the Interior to "surve[y] and to sell and dispose of . . . all the surplus unallotted and unreserved lands within [a] portion of said reservation. . . ." Finding this contrast in language to be "particularly illuminating," the court concluded that the allotment statute did not result in diminishment, stating that "[i]t would be contrary to the principle of resolving ambiguities in favor of the Indians were we to conclude that Congress intended the same meanings for the vastly different language employed in these two documents [the treaty and the allotment statute] affecting the Tribe." *Id.*

When compared to the language used in the 1854 and 1865 Omaha treaties, as well as statutes enacted by Congress around the turn of the century that the Supreme Court has construed to diminish reservation boundaries, I conclude that the language of the 1882 Act does not "clearly evince" Congress' "intent to change boundaries" of the Omaha Reservation,

Solem, 465 U.S. at 470. Rather, the 1882 Act indicates that the United States intended to act as the Omaha Tribe's sales agent for purposes of surveying and auctioning its reservation land west of the right-of-way, with the proceeds held in trust in the United States Treasury for the benefit of members of the Omaha Tribe. *See Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 139 L. Ed. 2d 773 (finding diminishment when act provided that Tribe would "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation" and the United States pledged a fixed payment of $600,000 in return); *Hagen*, 510 U.S. at 412-14 (finding diminishment when act's language provided for opened land to be "restored to the public domain" in the operative language of the statute opening reservation lands for settlement); *Solem*, 465 U.S. at 472-475 (finding that act "opened but did not diminish" reservation and that Secretary of the Interior was "simply being authorized to act as the Tribe's sales agent" when act authorized Secretary to "sell and dispose" of portions of reservation land and provided that "proceeds arising from the sale . . . shall be deposited in the Treasury of the United States, to the credit of the Indians . . . "; noting no "specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries"; finding that act's "isolated" and "ambiguous" references to "reservations thus diminished" and "public domain" were "hardly dispositive" and were insufficient to infer intent to diminish reservation

when balanced against act's purpose of opening reservation lands for sale to non-Indian settlers); *Rosebud Sioux Tribe*, 430 U.S. at 597 (finding diminishment when act was ratification of negotiated agreement with tribe that opened lands to settlement and appropriated and vested in the tribe $2.50 per acre in payment for the express cession and relinquishment of "all" of the tribe's "claim, right, title and interest" in the unallotted lands); *DeCoteau v. District County Court*, 420 U.S. 425, 436, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) (finding diminishment when tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest" in reservation land for payment of sum certain); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962) (finding no diminishment when act did *not* provide that reservation land was "vacated and restored to the public domain" and stated that proceeds from disposition of lands were to be deposited in United States Treasury "to the credit of the Colville . . . Indians"; stating that the "Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards"); *Duncan Energy*, 27 F.3d at 1297 (finding no disminishment when act "merely authorized the Secretary of the Interior to 'surve[y] and to sell and dispose of . . . all the surplus unallotted and unreserved lands within [a] portion of said reservation . . . '"; authorized Secretary to reserve land in opened

territory for schools and religious institutions for benefit of Indian tribe; prohibited intoxicants in Indian Country in the opened territory; reserved timber and coal rights in opened territory for tribe; and stated that United States would act as "trustee for said Indians").

B. Historical Context Surrounding Passage of Act

While Plaintiffs admit that the 1882 Act does not contain language that the Supreme Court has characterized as evidence of Congress' clear intent to diminish the Omaha Indian Reservation, Plaintiffs argue that "the legislative history of the 1882 Act and Congress' subsequent treatment of the land do make it clear that Congress intended to diminish and alter the boundaries of the reservation." (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF p. 41.)

"Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, *unequivocal* evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux Tribe*, 522 U.S. at 351 (emphasis added) (looking at manner in which legislation developed after negotiations with tribe and tenor of legislative reports presented to Congress and noting that while such "context" was not compelling enough to indicate diminishment standing alone, it did not rebut the statute's plain

terms, which established Congress' intent to diminish reservation).

> When events surrounding the passage of a surplus land act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress – unequivocally reveal a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Solem, 465 U.S. at 471.

The legislative history and the circumstances surrounding the 1882 Act indicate that in 1882, the only thing that can be said with certainty is that Congress understood that the stated purpose of the legislation at issue was "to sell this land and get it into cultivation, and the object of the Indians is to get the money and have it put in trust for them here in Washington where they can draw their interest." (Filing 117-17 at CM/ECF p. 17, 13 Cong. Rec. 3079 (1882) (statement of Sen. Saunders).) The congressional debate indicates both an intent to "sell off from this reservation . . . 50,000 acres *in a block* on the western side of it," but also an intent to honor an existing treaty which allowed "any Indian [to] go

upon any part of the whole reservation and occupy" the land.[10] (Filing 117-17 at CM/ECF p. 15 (statement of Sen. Dawes) (emphasis added).) These dual goals resulted in confusion and debate among members of Congress regarding treatment of the "Indian lands" versus lands of the "white people" who would be settling "side by side with the Indians," especially with regard to taxation.[11] The legislative history further indicates that the primary concern of the Omaha Tribe was obtaining "clear and full title" to land on which they had worked, farmed, and built houses upon and which they wished to pass on to their

---

[10] *See* Filing 117-17 at CM/ECF pp. 32-33 (statements of Rep. Haskell ("This is the protection of the Indians in the sale. Before any land is sold they are at liberty to make their individual selections. "; Indians' "severalty selections" may be made "anywhere in the reservation"; "Any Indian, however, who wishes to take his piece of land to the west of the railroad can do so.")).

[11] *See* Filing 117-17 at CM/ECF p. 16 (statement of Sen. Jones ("If you undertake to sell the Indian lands, and to permit the white people to buy them and settle side by side with the Indians, and thus consolidate and unite these two populations together, you cannot apply one rule to one and another to another. If you want to give Indians land in severalty, separate them from the white masses; recognize their independent organization, but do not undertake to mix them up side by side with the white people under such a system as this.")); *Id.* (statement of Sen. Butler ("I understand . that it is proposed to sell about fifty thousand acres of this reservation to anybody who chooses to purchase, Indian, white man, or anybody else. Do I understand that the Senator proposes to protect an Indian who purchases part of that 50,000 acres and takes it in severalty – does he propose to exempt that Indian from taxation?")).

children. (Filing 117-17 at CM/ECF pp. 19-30 (H.R. Rep. No. 1530, 47th Cong., 1st Sess. (July 1, 1882) (statements by 53 individual members of the Omaha Indian Tribe regarding their desire to have title to their land); Filing 117-17 at CM/ECF p. 30 (Big Elk stating, "We want titles to our lands. We are thinking of little else.").)

None of this legislative history establishes that Congress clearly contemplated that the area west of the right-of-way – whether sold in a "block" or in parcels among Indian allotments – would no longer be within the Omaha Reservation boundaries after the 1882 Act. Indeed, the parties do not cite, nor does the court find, specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries or whether the Act would transfer the Omaha Indians' tribal sovereignty in a particular geographic area. *See, e.g., Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1025 (noting that because Yankton Indian Commission report to Congress did not describe reservation boundaries or mention transfer of tribal sovereignty, the report did not indicate "clear and plain congressional intent" to terminate reservation status of nonceded lands).

The legislative history leading up to the passage of the 1882 Act is insufficient to establish an "unequivocal," widely held, contemporaneous understanding that the 1882 Act would diminish or alter the boundaries of the Omaha Reservation, as opposed to merely authorize the sale of reservation land to non-Indian settlers for the Omaha Tribe's benefit – that

is, to remove certain land within the Omaha Reservation from Indian control while retaining the reservation's original exterior boundaries. *Solem*, 465 U.S. at 477-78 (neither floor debates nor legislative reports contained clear statement that Indians agreed to "cede" opened areas – rather, Congress described Indians as being "satisfied to have the surplus and unalloted lands disposed of under the provisions of the bill as amended"; legislative debate centered on amount of money Indians would receive after sale and "no mention was made of the Act's effect on the reservation's boundaries or whether State or Federal officials would have jurisdiction over the opened areas"; while there was some legislative history supporting idea that reservation was diminished, Court could not find congressional purpose to diminish reservation "[w]ithout evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands" and without "some clear statement of congressional intent to alter reservation boundaries"); *City of New Town*, 454 F.2d at 125 (citing *Seymour*, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346) ("The opening of an Indian reservation for settlement by homesteading is not inconsistent with its continued existence as a reservation.").

The plaintiffs contend that an intent to diminish the Omaha Reservation is evident from the fact that from 1871 to 1882, the Omaha Tribe and various members of Congress consistently sought to "separate"

and sell 50,000 acres from the western portion of the Omaha Reservation. (*See* Undisputed Material Facts ¶¶ 24-28 of this Memorandum & Order.) However, if use of the word "separate" in proposed and actual legislation prior to 1882, as well as the phrase "to be separated from the remaining portion of said reservation" in the 1872 Act, have any legal relevance, then equally significant is Congress's decision to remove the word and phrase from the 1882 Act at issue here.

Like the use of the phrase "separate" in prior legislation, the Commissioner of Indian Affairs' two isolated statements – 10 years prior to the 1882 Act – referring to "diminishing these reservations" and "diminished reserve" also carry little weight. (See Undisputed Material Facts ¶¶ 26 & 28 of this Memorandum & Order.) The Supreme Court has held that even direct, contemporaneous congressional language "scattered through the legislative history" referring to "reduced reservation[s]" or "reservations as diminished" is ambiguous for purposes of diminishment analysis. *Solem*, 465 U.S. at 478. In using such phrases, "it is unclear whether Congress was alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers or to the reduction that a complete cession of tribal interests in the opened area would precipitate." *Id.*; *see also Lower Brule Sioux Tribe*, 711 F.2d at 819 (holding that the phrase "as diminished" had "nothing to do with the location of reservation boundaries"

and fell short of establishing congressional intent to disestablish).[12]

Because I have found that both the language in the 1882 Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," I am "bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346). However, I shall address the third prong of the well-established diminishment "analytical structure," as courts are to consider all three

---

[12] In *Solem*, both the Senate and House reports referred to a "reduced reservation" and to "reservations as diminished." *Solem*, 465 U.S. at 478 (citations omitted). The statute itself even referred to the reservation as "thus diminished" and to certain parts of the opened lands as "part of the public domain." *Id.* at 474-75. Yet the Supreme Court held that these statements did not constitute clear congressional intent to diminish reservation boundaries. Similarly, in *Yankton Sioux Tribe*, 522 U.S. at 353-54, references to restoring the land at issue to the "public domain" appeared in the legislative history of the statute, as well as in the annual report of the Commissioner on Indian Affairs. The Supreme Court found that the "context of the Act is not so compelling that, standing alone, it would indicate diminishment," but the Court went on to find diminishment because of the "almost insurmountable presumption that arises from the statute's plain terms." *Id.* at 351 (internal quotation marks and citation omitted). As explained above, the language of the 1882 Act does not raise such an "insurmountable presumption."

factors in determining whether an Indian reservation has been diminished.

C. Subsequent Treatment of Area & Pattern of Settlement

The plaintiffs assert that "jurisdictional history and population demographics" of the land at issue "'demonstrate[ ] a practical acknowledgment that the Reservation was diminished.'" (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF p. 43 (quoting *Hagen*, 510 U.S. at 421).)

> To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress's intentions. Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unalloted open lands.

Solem, 465 U.S. at 471. However, subsequent history is "less illuminating" than contemporaneous evidence. *Hagen*, 510 U.S. at 420. The court may also "look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 471-472.

1. Subsequent Treatment of Area

As evidence of diminishment, the plaintiffs argue that "[s]ince the early twentieth century, Indians have comprised less than two percent of the population west of the right[-of-way] and State and local officials – not the Omaha Tribe – have exercised exclusive jurisdiction over the land." (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF p. 43.) The plaintiffs also cite as persuasive the facts that (1) Congress treated the disputed land as if it were no longer part of the Omaha Reservation by passing the 1888 extension, which directed that in the event a settler defaulted on payment for a homestead claim in the disputed territory, the land was to be sold at public auction, not revert back to tribal ownership; (2) the Bureau of Indian Affairs issued reports and statements indicating their belief that the land west of the right-of-way was no longer part of the reservation; and (3) a local court and the Nebraska Attorney General determined that the property west of the right-of-way was no longer part of the Omaha Reservation after the 1882 Act. (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF pp. 45-49.)

It is true that Congress postponed the 1882 Act's payments required from non-Indian settlers via subsequent legislation enacted in 1885, 1886, 1888, 1890, and 1894. (See Undisputed Material Facts ¶ 61 of this Memorandum & Order.) These extensions were passed several years after the 1882 Act, yet Congress continued to reference the disputed area as the "Omaha Indian Reservation" and "Omaha lands." *See*

49 Cong. Ch. 844, Act of Aug. 2, 1886, 24 Stat. 214 ("all persons who have settled or shall settle upon said Omaha lands"); 50 Cong. Ch. 255, Act of May 15, 1888, 25 Stat. 150 (Secretary of Interior authorized to extend the time for payment due for "land sold on [the] Omaha Indian Reservation . . . by virtue of an act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska"); 51 Cong. Ch. 803, Act of Aug. 19, 1890, 26 Stat. 329 (same); 53 Cong. Ch. 254, Act of Aug. 11, 1894, 28 Stat. 276 (same). This would suggest that the opened area remained a part of the reservation. *Solem*, 465 U.S. at 478-79 (two years after the surplus land statute at issue, Congress passed another bill referring to "'lands *in the Cheyenne River Indian Reservation,*' suggesting that the opened area was still a part of the reservation") (citation omitted) (emphasis in original).

The 1888 extension Act, 25 Stat. 150, also addressed what was to happen upon default by a purchaser, a scenario about which the 1882 Act was silent. The 1888 Act provided that upon default by a purchaser, the Secretary of the Interior was to sell the land at public auction to the highest bidder, over and above the original appraisal, with "the proceeds of all such sales . . . covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians." 25 Stat. 150 § 3. Under the 1888 Act, the United States merely continued to act as trustee for the Tribe so the Tribe gained the financial benefit of the sale. Congress's reaffirmation in the 1888 Act that

the United States served as trustee for the Tribe's benefit, as opposed to the absolute owner of unrestricted fee title by virtue of the cession of Indian lands, hints that diminishment did not occur. *See, e.g., Ash Sheep Co. v. United States*, 252 U.S. 159, 164-66, 40 S. Ct. 241, 64 L. Ed. 507 (1920) (distinguishing between the United States acting as trustee for a tribe and the United States acquiring unrestricted title to their lands by tribal cession). In addition, 12 years after the passage of the 1882 Act, Congress stated that the 1894 extension "shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained," 53 Cong. Ch. 254, 1894 Act, 28 Stat. 276, again suggesting the continued reservation status of the disputed lands.

As to treatment of the area west of the right-of-way following the 1882 Act, the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States. (See Undisputed Material Facts of this Memorandum & Order ¶¶ 60, 63-64, 67-72, 75, 83, 85-87, 89-91, 97-99, 101-102, 104; Filing 107, Exs. 1 & 2; Filing 106-3; Filings 123-2, 123-3, 123-4, 123-5, 123-6, 123-7, 123-8, 123-9.)

A "mixed record" which fails to reveal a consistent or dominant approach to the territory at issue is of "limited interpretive value," carries "little force," and cannot be considered dispositive of the question whether Congress intended to diminish the Omaha Reservation in the 1882 Act. *Yankton Sioux Tribe*, 522 U.S. at 354-355 (citing conflicting descriptions of

disputed land by Congress and Executive Branch and inconsistent "scores of administrative documents and maps" presented by parties; finding that such evidence carried "little force in light of the strong textual and contemporaneous evidence of diminishment" and that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (internal quotations and citations omitted)); *Solem*, 465 U.S. at 478-479 ("The subsequent treatment of the Cheyenne River Sioux Reservation by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side."); *Rosebud Sioux Tribe*, 430 U.S. at 604 n.27 (sporadic and contradictory history of congressional and administrative actions carried "little force" in light of state's longstanding and clear assumption of jurisdiction over disputed area, with acquiescence by the tribe and federal government); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d at 1029 n.11 (conflicting representations of reservation boundaries in administrative materials and maps had limited interpretive value, as "use of the term 'Yankton Sioux Reservation' in such documents, without more, cannot be said to be a considered jurisdictional statement regarding the specific status of the remaining Indian lands").

2. Pattern of Settlement

The plaintiffs argue that "[s]ince the early twentieth century, Indians have comprised less than two percent of the population west of the right[-of-way] and State and local officials – not the Omaha Tribe –

have exercised exclusive jurisdiction over the land." (Filing 118, Pls.' Br. Supp. Mot. Summ. J. at CM/ECF p. 43.)

> "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." [*Solem*, 465 U.S.] at 471, 104 S. Ct., at 1166. This final consideration is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation.

Yankton Sioux Tribe, 522 U.S. at 356. The Court has also noted that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 U.S. at 472 n.12.

The parties agree that very few Omaha Indians settled west of the right-of-way but, as stated above, this is the "least compelling" factor in diminishment analysis because every act of this kind necessarily resulted in "a surge of non-Indian settlement," yet the Supreme Court has found that diminishment did not occur. *Yankton Sioux Tribe*, 522 U.S. at 356.

The parties also agree that "many" members of the Omaha Tribe have regularly visited, resided in, and conducted business in Pender. Community involvement by members of the Omaha Tribe suggests their understanding that Pender sits within reservation boundaries. For example, as early as 1890, an attorney and member of the Omaha Tribe maintained an office and residence in Pender, as well as served as mayor of the Village of Pender, Thurston County surveyor, and justice of the peace. At a time not specified by the parties, another attorney and enrolled member of the Omaha Tribe resided and practiced law in Pender, where his children attended the public schools. He also served as the Thurston County Attorney for eight years before being elected as a county judge. Finally, there is some historical evidence that the Omaha Indians have held several additional public offices in Thurston County, including county coroner, constable, road overseer, election officer, and juror in the county and district courts. (Undisputed Material Facts of this Memorandum & Order ¶¶ 76-81 (citing *Hallowell v. United States*, 221 U.S. 317, 319-20, 31 S. Ct. 587, 55 L. Ed. 750 (1911).)

In contrast, the parties have stipulated that Omaha Tribal authorities enforce various portions of the Omaha Tribal Code east, but not west, of the right-of-way; the Omaha Tribe does not offer foster care or medical, welfare, or child protective services west of the right-of-way; the Omaha Tribe does not have an office and does not operate a school, industry, or business west of the right-of-way; no tribal

celebrations or ceremonies take place west of the right-of-way; the Omaha Tribe does not conduct governmental or ceremonial activities west of the right-of-way; and the Tribe has no mineral rights or other claims to land west of the right-of-way. (Undisputed Material Facts of this Memorandum & Order ¶¶ 95-96.)

As was the case with state and federal agencies' inconsistent treatment of the disputed land following the 1882 Act, this "mixed" evidence regarding the demographics of the area west of the right-of-way is not dispositive. *Solem*, 465 U.S. at 478-79 (finding no diminishment where "[t]he subsequent treatment of the Cheyenne River Sioux Reservation by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side"); *Duncan Energy*, 27 F.3d at 1297 ("Throughout the [diminishment] inquiry, ambiguities are to be resolved in favor of the Indians, and diminishment should not be found lightly.").

Even if this demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation. *Duncan Energy*, 27 F.3d at 1298 ("We find . . . exclusive reliance on the third *Solem* factor to create a quasi-diminishment totally inappropriate.").

IV. CONCLUSION

"Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. Congress did not explicitly indicate otherwise here, as neither the 1882 Act's statutory language, the legislative history and circumstances surrounding the passage of the Act, nor the demographic history of the land west of the right-of-way demonstrate clear congressional intent to diminish the boundaries of the Omaha Indian Reservation or a widely-held, contemporaneous understanding that Congress's action would diminish those boundaries.

Accordingly,

IT IS ORDERED:

1. Because the 47th Congress's Act of August 7, 1882, 22 Stat. 341, did not diminish the boundaries of the Omaha Indian Reservation as they existed at that time, the motion for summary judgment (Filing 116) filed by Plaintiffs requesting declaratory and injunctive relief from the Omaha Indian Tribe's attempt to enforce the Omaha Tribe's Beverage Control Ordinance, as amended, 71 Fed. Reg. 10056 (Feb. 28, 2006), against Defendants is denied;

2. The motion for summary judgment (Filing 113) filed by Defendants is granted;

3. The temporary restraining order prohibiting the enforcement of the Omaha Tribe's Beverage Control Ordinance in Pender, Nebraska, which was later extended by a stipulation of the parties (Filings 16 & 29), is dissolved;

4. The State of Nebraska's claims as plaintiff-intervenor are mooted by my finding that the 1882 Act did not diminish the Omaha Indian Reservation; and

5. Judgment in favor of Defendants and Defendant-Intervenor and against Plaintiffs and Plaintiff-Intervenor providing that Plaintiffs and Plaintiff-Intervenor shall take nothing shall be entered by separate document.

DATED this 13th day of February, 2014.

BY THE COURT:

/s/ Richard G. Kopf

Senior United States District Judge

JUDGMENT

Pursuant to the Memorandum and Order filed this date finding that the 47th Congress's Act of August 7, 1882, 22 Stat. 341, did not diminish the boundaries of the Omaha Indian Reservation as they existed at that time and denying Plaintiffs' and Plaintiff-Intervenor's requests for declaratory and injunctive relief from the Omaha Indian Tribe's attempt to enforce against Defendants the Omaha Tribe's Beverage Control Ordinance, as amended, 71 Fed. Reg. 10056 (Feb. 28, 2006),

JUDGMENT is hereby entered in favor of Defendants and Defendant-Intervenor and against Plaintiffs and Plaintiff-Intervenor, providing that: (1) Plaintiffs and Plaintiff-Intervenor shall take nothing; and (2) the temporary restraining order prohibiting the enforcement of the Omaha Tribe's Beverage Control Ordinance in Pender, Nebraska, which was later extended by a stipulation of the parties, is dissolved.

DATED this 13th day of February, 2014.

BY THE COURT:

/s/ Richard G. Kopf

Senior United States District Judge

Richard M. Smith, et al., Appellants v. Mitch Parker, In his official capacity as Chairman of the Omaha Tribal Council, et al., Appellees

No: 14-1642

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2015 U.S. App. LEXIS 3054

February 26, 2015, Decided

COUNSEL: For Richard M. Smith, Donna Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Kevin Brehmer, Ron Brinkman, Village of Pender, Plaintiffs-Appellants: Mark Davis Hill, HUSCH & BLACKWELL, Omaha, NE; Marnie Jensen, Gene Summerlin, HUSCH & BLACKWELL, Lincoln, NE.

For State of Nebraska, Intervenor Plaintiff-Appellant: Blake E. Johnson, Assistant Attorney General, David A. Lopez, Assistant Attorney General, Ryan Post, Assistant Attorney General, Katherine J. Spohn, Assistant Attorney General, ATTORNEY GENERAL'S OFFICE, Lincoln, NE.

For Mitch Parker, In his official capacity as Chairman of the Omaha Tribal Council, Barry Webster, In his official capacity as Vice-Chairman of the Omaha Tribal Council, Amen Sheridan, In his official capacity as Treasurer of the Omaha Tribal Council, Rodney Morris, In his official capacity as Secretary of the Omaha Tribal Council, Orville Cayou, In his official capacity as Member of the Omaha Tribal Council,

Eleanor Baxter, In her official capacity as Member of the Omaha Tribal Council, Ansley Griffin, In his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants-Appellees: Nora Marie Kane, Patricia A. Zieg, STINSON & LEONARD, Omaha, NE; Mark Jon Peterson, PETERSON LAW OFFICE, Omaha, NE.

For The United States, Intervenor Defendant-Appellee: Katherine J. Barton, Mary Gabrielle Sprague, U.S. DEPARTMENT OF JUSTICE, Environment & Natural Resources Division, Appellate Section, Washington, DC; Daron Carreiro, U.S. DEPARTMENT OF JUSTICE, Environmental Enforcement Division, Washington, DC.

OPINION

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Act of August 7, 1882

FORTY-SEVENTH CONGRESS. SESS. I. CH. 434, 1882.

CHAP. 434. – An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made

valuable improvements thereon, or the heirs-at law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit, absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre; *And provided further*, That all land in

township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, alter paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall he placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lauds offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen

hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan

child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said

State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allottments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in

common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the laud which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, August 7, 1882.

No. 14-1406

In the Supreme Court of the United States

STATE OF NEBRASKA ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
WILLIAM B. LAZARUS
KATHERINE J. BARTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Congress diminished the boundaries of the Omaha Indian Reservation by the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Hagen v. *Utah*, 510 U.S. 399 (1994) 7
Solem v. *Bartlett*, 465 U.S. 463 (1984) ..... *passim*
South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 12
Sprietsma v. *Mercury Marine*, 537 U.S. 51 (2002) 9

Treaties and statutes:

Treaty of Mar. 16, 1854, U.S.-Omaha Tribe, 10 Stat. 1043 2
art. 4, 10 Stat. 1044 2
Treaty of Mar. 6, 1865, U.S.-Omaha Tribe, 14 Stat. 667 2
art. I, 14 Stat. 667 2
art. V, 14 Stat. 668 2
Act of June 10, 1872, ch. 436, 17 Stat. 391 2
Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 2
§ 8, 22 Stat. 343 3
18 U.S.C. 1161 4

Miscellaneous:

71 Fed. Reg. 10,056 (Feb. 28, 2006) 4

In the Supreme Court of the United States

No. 14-1406

STATE OF NEBRASKA ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 774 F.3d 1166. The opinion of the district court (Pet. App. 9-78) is reported at 996 F. Supp. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2014. A petition for rehearing en banc was denied on February 26, 2015 (Pet. App. 80-81). The petition for a writ of certiorari was filed on May 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the

Omahas "for their future home." Treaty of Mar. 16, 1854, U.S.-Omaha Tribe, 10 Stat. 1043. The Tribe agreed to "cede" to the United States "all claims" to a portion of its historic lands in exchange for a fixed sum of $840,000. *Id.* art. 4, 10 Stat. 1044. The remaining land, which was designated the Omaha Reservation, comprised 300,000 acres in northeast Nebraska. Pet. App. 20.

In 1865, the Tribe agreed to "cede, sell, and convey" to the United States approximately 98,000 acres from the northern part of the Reservation in exchange for a fixed sum of $50,000 and certain other promises by the government. Treaty of Mar. 6, 1865, U.S.-Omaha Tribe, 14 Stat. 667. The 1865 Treaty required the Tribe to "vacate and give possession of the lands ceded" by the treaty "immediately after its ratification," so that land could be made available to the Winnebago Tribe.[1] *Id.* arts. I & V, 14 stat. 667-668.

In 1872, in response to a request from the Tribe, Congress authorized the Secretary to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation, to be delineated by a north-south line. Act of June 10, 1872, ch. 436, 17 Stat. 391. The 1872 Act provided that the proceeds would be deposited in the United States Treasury for the benefit of the Tribe. *Ibid.* The 1872 Act failed to raise substantial funds, however: Only two sales comprising 300.72 acres were made under the statute. Pet. App. 23.

b. In 1882, Congress again authorized the Secretary to survey, appraise, and sell lands on the western side of the Reservation. Act of Aug. 7, 1882, ch. 434,

---

[1] In 1874, the Omaha Tribe sold to the United States an additional 12,374.53 acres from the northeastern corner of the Reservation for use by the Winnebago Tribe. Pet. App. 24.

22 Stat. 341. The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company." *Ibid.* The Tribe had granted the "right of way" mentioned in the 1882 Act two years earlier. The right-of-way ran in a diagonal line "from the northern edge of [the] reservation generally southeastward" to its southern border. Pet. App. 20.

The 1882 Act allowed the Omahas to select allotments in the opened area. The Act provided that Tribe members "may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act." § 8, 22 Stat. 343. "[U]nallotted lands" west of the railroad right-of-way were made available for purchase and settlement by non-members, with the sale proceeds "placed to the credit of said Indians in the Treasury of the United States." *Id.* at 341

Following the 1882 Act, Tribe members selected 10 to 15 allotments, totaling 876 acres, west of the railroad right-of-way. Pet. App. 34. The rest of the newly opened land was sold to settlers and patented over the next several decades. *Id.* at 34, 36.

2. a. Pender, Nebraska, is a town of approximately 1300 residents situated on land lying west of the Sioux City and Nebraska railroad right-of-way, in the area opened to sale by the 1882 Act. Pet. App. 14-15, 38. In 2004, the Omaha Tribe adopted an alcoholic beverage control ordinance regulating the sale of alcohol within the boundaries of the Omaha Reservation. *Id.*

at 16. The ordinance was certified by the Department of the Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Following certification, the Tribe began notifying liquor retailers, including retailers in Pender, of its intention to enforce the ordinance. Pet. App. 16-18.

In 2007, Pender and several beverage retailers sued tribal officials in federal district court seeking a declaration that Pender is not within the Omaha Reservation and seeking an injunction barring the Tribe from enforcing its liquor ordinance against them. Pet. App. 18. The court granted a temporary restraining order and stayed further proceedings so that the plaintiffs could exhaust their remedies in Omaha tribal court. *Id.* at 18-19. On February 4, 2013, the tribal court concluded that the 1882 Act did not diminish the Omaha Reservation's boundaries. *Id.* at 19. This action resumed in the district court, where the State of Nebraska intervened as a plaintiff and the United States intervened as a defendant. *Id.* at 46-47.

b. On cross motions for summary judgment, the district court ruled against petitioners. Pet. App. 9-78. The court observed at the outset that petitioners had conceded that 18 U.S.C. 1161 permits the Tribe to regulate liquor sales "on its reservation land and in 'Indian country,'" Pet. App. 11 n.2, and thus that the Tribe's ordinance applies to liquor retailers in Pender if the retailers are within the Omaha Reservation. The court then proceeded to apply the three-prong test articulated in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), for determining whether a statute "clearly evince[s]" the requisite Congressional intent to "divest a reservation of its land and diminish its boundaries." *Id.* at 470. Evaluating each factor, the court concluded that Congress did not intend for the 1882

Act to diminish the Omaha Reservation. Pet. App. 55-76.

First, the district court looked at the statutory language, which *Solem* identified as the "most probative evidence of congressional intent." 465 U.S. at 470. The court agreed with petitioners' "admi[ssion]" that the language of the 1882 Act "does not work in their favor." Pet. App. 56. The court based that conclusion on several features of the Act:

> The language of the 1882 Act does not provide for cession, relinquishment, conveyance, or surrender of all rights, title, or interest to the Omaha Tribe's land in exchange for a specific sum of money; does not restore lands to the public domain; and does not require the Tribe to vacate their reservation land. Rather, the Act states that land west of the right-of-way could "be surveyed, if necessary, and sold" and, after survey and "appraisement," could be proclaimed by the Secretary of the Interior as "open for settlement." Proceeds of the sales were to be "placed to the credit of said Indians in the Treasury of the United States," and income was to "be annually expended for the benefit of said Indians." Further, Article 8 of the 1882 Act allows "Indians . . . [to] select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way*," suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation.

Id. at 57 (brackets in original) (citation omitted). The court also noted the contrast between the 1882 Act and "the Omaha Treaties of 1854 and 1865," in which the Tribe "expressly agreed to 'cede, sell, and convey'

land to the United States and 'relinquish . . . all claims' thereto in exchange for fixed sums of money, demonstrating that both Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so." *Id.* at 58 (citations omitted).

Second, the district court examined "[t]he legislative history and the circumstances surrounding the 1882 Act." Pet. App. 63. In the court's view, "[n]one of th[e] legislative history establishes that Congress clearly contemplated" diminishment of the Reservation. *Id.* at 65; see *ibid.* ("[T]he parties do not cite, nor does the court find, specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries."). The court concluded that the evidence was "insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act would diminish or alter the boundaries of the Omaha Reservation." *Ibid.* (quoting *Solem*, 465 U.S. at 471).

Following its analysis of the second *Solem* factor, the district court stated:

> Because I have found that both the language in the 1882 Act and its legislative history "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," I am "bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. However, I shall address the third prong of the well-established diminishment "analytical structure," as courts are to consider all three factors in determining whether an Indian reservation has been diminished.

Pet. App. 68-69 (citation omitted).

The district court thus turned to the third *Solem* factor—the subsequent treatment of the area and the pattern of settlement—which is considered "'less illuminating' than contemporaneous evidence." Pet. App. 69 (quoting *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994)). The court analyzed five statutes enacted between 1885 and 1894, which (1) referred to the opened area as "the 'Omaha Indian Reservation' and 'Omaha lands,'" (2) confirmed that the United States continued to serve as trustee over the opened area with respect to sale proceeds for the Tribe's benefit, and (3) required the Tribe's consent before granting payment extensions to buyers of parcels within the opened area. *Id.* at 70-72 (citations omitted). Those statutes, the court found, "suggest[] the continued reservation status of the disputed lands." *Id.* at 72. As to "treatment of the area west of the right-of-way following the 1882 Act," the court concluded that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Ibid.*[2] Finally, the

---

[2] Among other things, the district court found the following: Since 1922, the Nebraska legislature has defined the western boundary of Thurston County, which lies within the area opened to sale by the 1882 Act, as lying within the existing Omaha Reservation. Pet. App. 40-41. In 1969, the Nebraska legislature retroceded to the United States criminal jurisdiction over certain offenses committed within Indian country that is located in Thurston County. *Id.* at 42. "The legal description of the land in the Notice of Acceptance of Retrocession of Jurisdiction delineates the Omaha Indian Reservation *as originally surveyed*." *Ibid.* (emphasis added). In 1992, the Nebraska State Tax Commissioner issued a Revenue Ruling locating the Village of Pender "within the boundaries of the Omaha Indian Reservation." *Id.* at 48.

district court found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76 (citation omitted).

Summarizing its findings, the district court stated:

> [N]either the 1882 Act's statutory language, the legislative history and circumstances surrounding the passage of the Act, nor the demographic history of the land west of the right-of-way demonstrate clear congressional intent to diminish the boundaries of the Omaha Indian Reservation or a widely-held, contemporaneous understanding that Congress's action would diminish those boundaries.

Id. at 77.

3. The court of appeals affirmed. Pet. App. 1-8. Based on its "de novo review" (*id.* at 6), the court of appeals concluded that the district court had

> accurately discerned the contemporaneous intent and understanding of the 1882 Act. The [district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus.

Id. at 7. The court of appeals thus found "nothing in this case to overcome the 'presumption in favor of the continued existence' of the Omaha Indian Reservation." *Ibid.* (internal quotation marks omitted). While recognizing the impact of its decision on the community of Pender, the court of appeals concluded that "the district court conducted the appropriate analysis and we agree." *Id.* at 8.

Petitioners sought rehearing and rehearing en banc, but their requests were denied. Pet. App. 80-81.

ARGUMENT

Petitioners seek this Court's review regarding "[w]hether ambiguous evidence concerning the first two *Solem* factors necessarily forecloses any possibility that diminishment could be found on a *de facto* basis." Pet. i. See *Solem* v. *Bartlett*, 465 U.S. 463 (1984). That question is not presented here, because the district court found—and the court of appeals agreed—that none of the three *Solem* factors favored petitioners' diminishment claim. That conclusion, which turns on statutes and circumstances unique to this one Reservation, does not conflict with the decision of any other court of appeals.

1. As a threshold matter, the petition should be denied because petitioners have waived the issue on which they seek review. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (arguments not raised below are waived). Petitioners did not argue in the court of appeals, as they do in this Court, that the district court's analysis had "preclude[d] proper consideration" of the third *Solem* factor. Pet. 10. To be sure, petitioners *did* argue that the third factor should be resolved in their favor—*i.e.*, they argued that historical and demographic evidence pointed towards diminishment, rather than being "inconsistent" and "mixed," as the district court had found. Pet. App. 72, 76; see State of Neb. C.A. Br. 10-13; Brehmer et al. C.A. Br. 49-59. But petitioners did not contend that the district court had exclusively relied on the first two *Solem* factors in a manner that "necessarily foreclose[d] any possibility" of finding diminishment based

on the third factor. Pet. i. The petition should be denied on that basis alone.

2. The question presented is also not implicated by this case, because it rests on premises that are factually incorrect: The courts below did not conclude that their assessment of the first two *Solem* factors "foreclose[d]" consideration of the third factor. Pet. i. Rather, the district court examined all three factors at great length, concluding that none of them "demonstrate[d] clear congressional intent to diminish the boundaries of the Omaha Indian Reservation," as required for a finding of diminishment under *Solem*. Pet. App. 77. With respect to the third factor in particular, the district court found: (1) that statutes enacted after 1882 "suggest[] the continued reservation status of the disputed lands," *id.* at 72; (2) that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States," *ibid.*; and (3) that "evidence regarding the demographics of the area west of the right-of-way" was "mixed," *id.* at 76. The court of appeals endorsed the district court's analysis, including the district court's treatment of "contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends." *Id.* at 7. Those express findings refute petitioners' assertion that either court relied on the first two factors to "create[] a *conclusive presumption of non-diminishment* not subject to rebuttal by evidence concerning the third *Solem* factor." Pet. 16-17.

Petitioners point to the district court's statement that it was "bound * * * to rule that diminishment did not take place" in light of "the language in the 1882

Act and its legislative history." Pet. 18 (quoting Pet. App. 68). Petitioners also highlight the district court's statement that "even if th[e] demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation." Pet. 19 (quoting Pet. App. 76) (emphasis omitted). Yet those statements are fully consistent with petitioners' own statement below that "diminishment cannot be based solely on demographic data and subsequent treatment." Pet. for Reh'g 6.

In any event, the district court *did* proceed to "address the third prong of the well-established diminishment" test, acknowledging that "courts are to consider all three factors in determining whether an Indian reservation has been diminished." Pet. App. 68-69. And the court found that the demographic evidence was "mixed," favoring neither side. *Id.* at 76. Petitioners accordingly could not have prevailed on their diminishment claim, regardless of the amount of weight given to the third *Solem* factor. Moreover, the court of appeals, in finding the Reservation was not diminished by the 1882 Act, relied on the district court's "careful[] review" of not only the legislative history and contemporary context of the 1882 Act itself, but also of "subsequent congressional and administrative references to the Reservation, and demographic trends," Pet. App. 7—matters specifically relevant to the third *Solem* factor. Thus, the decision of the court of appeals, which petitioners ask the Court to review, clearly did consider the third *Solem* factor.

3. Finally, the decision below does not conflict with the decision of any other court of appeals or otherwise warrant review. This Court has explained that courts should begin with a "presumption that Congress did not intend to diminish the reservation." *Solem*, 465 U.S. at 481. That presumption may be overcome only by "substantial and compelling evidence of a congressional intention to diminish Indian lands." *Id.* at 472. In this case, as described above, the district court found—and the court of appeals agreed—that none of the three *Solem* factors favored a finding of diminishment. See Pet. App. 7; *id.* at 77.

Petitioners repeatedly refer to "ambiguous evidence concerning the first two *Solem* factors." Pet. i; see Pet. 18 ("ambiguity regarding the first two *Solem* factors); Pet. 19 ("ambiguous evidence regarding statutory language and legislative history"); Pet. 25 ("ambiguous evidence"). In fact, the courts below found that the first factor, which this Court has labeled the "most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, strongly suggests that Congress did not intend to diminish the Reservation. See Pet. App. 55-62; see also *id.* at 56 ("[Petitioners] admit that the most probative factor to be examined in a diminishment inquiry * * * does not work in their favor."). In any event, petitioners misunderstand their burden under this Court's diminishment jurisprudence—including the admonition that courts must "resolve any ambiguities in favor of the Indians." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (citation omitted). A finding of diminishment requires evidence "establish[ing] a clear congressional purpose to diminish the reservation." *Solem*, 465 U.S. at 476. Petitioners' assertion that the

evidence concerning the first two *Solem* factors was "ambiguous"—and the similar conclusion by the courts below concerning the third factor—do not demonstrate the requisite "clear congressional purpose."

Indeed, petitioners do not claim that this case would have come out differently in another circuit. Instead, petitioners selectively identify evidence relating to the third *Solem* factor, "demographic and jurisdictional history," which purportedly supports their position. Pet. 19-25. But the district court examined all evidence in the record and concluded that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." Pet. App. 72; see *ibid.* (finding "[a] 'mixed record' which fails to reveal a consistent or dominant approach to the territory at issue"). The court also found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76. Petitioners may disagree with those fact-bound conclusions, but any such disagreement does not create a dispute worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
WILLIAM B. LAZARUS
KATHERINE J. BARTON
Attorneys

AUGUST 2015

No. 14-1406

In The
Supreme Court of the United States

STATE OF NEBRASKA
AND
VILLAGE OF PENDER, NEBRASKA,

Petitioners,

v.

MITCH PARKER
AND
UNITED STATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

DOUGLAS J. PETERSON
Nebraska Attorney General
RYAN S. POST
Counsel of Record
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
ryan.post@nebraska.gov

Attorneys for the State of Nebraska

GENE SUMMERLIN
MARNIE JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, Nebraska 68508
(402) 434-8040
gene.summerlin@huschblackwell.com
marnie.jensen@huschblackwell.com
mark.hill@huschblackwell.com

Attorneys for Individual & Village Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS..... 1

I. Petitioners Preserved Review Of Their Diminishment Claim 1

II. Nebraska's Longstanding Assumption Of Exclusive Jurisdiction Over The Area That Is, And Always Has Been, Over Ninety-Eight Percent Non-Indian Confirms Diminishment of the Reservation..... 3

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) 4, 6, 7

Decoteau v. Dist. Cnty. Ct., 420 U.S. 425 (1975).....6

Hagen v. Utah, 510 U.S. 399 (1994).....5, 6

Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).....2

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....5, 6

Solem v. Bartlett, 465 U.S. 463 (1984).....1, 2, 6, 7, 8

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).....5

Wisconsin v. Stockridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 2

STATUTES

Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 .....1, 2, 6, 8

REPLY BRIEF FOR THE PETITIONERS

This case warrants the Court's review, as the Eighth Circuit's decision effectively removed the third factor in *Solem v. Bartlett*, 465 U.S. 463 (1984), from the diminishment analysis and alters the status quo by expanding the jurisdiction of the Omaha Tribe more than 130 years after diminishment.

The State of Nebraska consistently and exclusively exercised jurisdiction over Pender without contest or objection from the Omaha Tribe or the United States from 1882 until 2006. Immediately following the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341, the major portion of the disputed area was quickly absorbed by settlers. Since the early twentieth century, non-Indians have comprised more than 98% of the area's population and more than 98% of the land in the area was conveyed from the United States to non-Indians. Neither Pender nor its citizens have ever been subjected to the jurisdiction of the Omaha Tribe. These facts are undisputed and lead to one conclusion – that the Omaha Reservation was diminished long ago. The citizens of Pender have developed justifiable expectations accordingly.

I. Petitioners Preserved Review Of Their Diminishment Claim.

Respondents try to avoid the lower courts' disregard of the third *Solem* factor and *de facto* diminishment by selectively identifying instances where the Petitioners argued to the Eighth Circuit that the

third factor should be resolved in their favor but did not explicitly state that the courts' analysis "precluded proper consideration" of the third factor. Br. in Opp. 9. But Respondents ignore (1) this issue was repeatedly raised, and (2) the lower courts expressly declined application of the third factor even after finding unclear statutory language and legislative history.

1. Contrary to Respondents' assertion, the issue on appeal was "Whether Congress diminished the boundaries of the Omaha Indian Reservation in Nebraska by the Acts of June 10, 1872, and August 7, 1882." State of Neb. C.A. Br. 5; Brehmer et al. C.A. Br. 11. That question is presented by this petition. As part of that broader question below, and presented more specifically to this Court, Petitioners questioned the exclusion of the third factor in the analysis. See State of Neb. C.A. Reply Br. 4, 6-7; Brehmer et al. C.A. Reply Br. 10-17. Moreover, Petitioners identified how the case would likely be decided differently in both the Seventh and Tenth Circuits, which have both found reservations diminished/disestablished when applying all three factors of the *Solem* test. See Brehmer et al. C.A. Reply Br. 14-17. In these two cases, the courts found diminishment/disestablishment despite the absence of explicit termination language in either of the Acts at issue. *Wisconsin v. Stockridge-Munsee Cmty.*, 554 F.3d 657, 662-65 (7th Cir. 2009) and *Osage Nation v. Irby*, 597 F.3d 1117, 1123-28 (10th Cir. 2010). The lower courts should have reached the same conclusion in this case.

2. In error, the district court found that it was bound to rule that diminishment did not occur (App. 68), regardless of evidence on the third factor establishing diminishment. (App. 76). Respondents try to gloss over this error – like the court of appeals did – by characterizing the district court's cursory inclusion of "subsequent treatment" discussion as confirmation "the district court examined all three factors at great length." Br. in Opp. 10. However, simply describing the district court's analysis as thorough, and at great length, does not mean either court considered the third factor after finding unclear statutory language and legislative history. The district court confirmed it precluded consideration of the third factor when it stated that it would only address the third factor to comply with the analytical structure. (App. 68-69). Then, instead of recognizing the district court's rationale for what it was, a two-factor test, the Eighth Circuit deemed additional analysis "unnecessary surplus." (App. 7).

II. Nebraska's Longstanding Assumption Of Exclusive Jurisdiction Over The Area That Is, And Always Has Been, Over Ninety-Eight Percent Non-Indian Confirms Diminishment of the Reservation.

Nebraska's longstanding assumption of exclusive jurisdiction over the area that is, and always has

been, over ninety-eight percent non-Indian confirms diminishment of the reservation.

There is no dispute that:

- Immediately following the 1882 Act, the major portion of the disputed area was quickly absorbed by settlers;
- Since the early twentieth century, non-Indians have comprised more than 98% of the area's population;
- More than 98% of the land in the area was conveyed from the United States to non-Indians;
- Neither Pender nor its citizens have ever been subjected to the jurisdiction of the Omaha Tribe; and
- The Omaha Tribe asserted jurisdiction over Pender for the first time in 2006 when it wished to tax the sale of alcoholic beverages.

Moreover, the State of Nebraska has consistently exercised jurisdiction over Pender without contest or objection from the Omaha Tribe or the United States from 1882 until 2006. The Omaha Reservation was diminished long ago. See *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215-16 (2005) (in a different, but related context, reiterating that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may

create justifiable expectations"), quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977); *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

1. The undisputed demographics of the area reveal diminishment. Since 1900, there have never been more than 72 Indians (1.8% of the total population) living on this land, and as of the year 2000, only 21 Indians (0.83% of the total population) lived there. These facts stand in stark contrast to the demographics of the land east of the right of way, where 2,337 Indians (69.78% population) lived as of 2000. Viewed another way, as of 2000, less than 1% of the total population of Indians living in the counties with territory affected by the 1882 Act (Thurston and Cuming) live on the west side of the right of way.

By the end of 1883, only 10 to 15 Indian allotments totaling 876 of the approximately 50,000 acres, less than 2% of the total acreage, in the area had been allotted to Omaha Tribe members. (App. 34). The remaining 98% of the land was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913. (App. 36). And by 1919, "all lands allotted to Omaha Tribe members west of the Railroad right-of-way had been patented in fee simple; thus, no trust land remained west of the demarcation line." *Id.*

These statistics are even more compelling than those described in the four cases where this Court found diminishment. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-57 (1998) (two-thirds

of the population was non-Indian and more than 90% of the reservation lands were in non-Indian lands); *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 605 (1977) (involved land that was "over 90% non-Indian both in population and in land use"); *Decoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975) (approximately 90% of the population was non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). This near-total absence of Indian character combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421; see also *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

2. The State of Nebraska immediately assumed, and has consistently asserted jurisdiction over the area. Before 2006, the Omaha tribe and the United States apparently deemed the State of Nebraska's assumption of jurisdiction over the area, and the citizens of Pender's reliance on this assumption of jurisdiction, as consistent with the 1882 Act. There is no evidence in the record that before 2006 the Omaha Tribe attempted to enforce tribal ordinances in the area. (App. 47). Nor does the Tribe offer foster care, medical, welfare, or child protective services in the

area. *Id.* The Tribe does not have an office, operate a school, industry, or business in the area or conduct any governmental or ceremonial activities there. (App. 47-48). The Tribe has no mineral rights or other claims to land in the area. (App. 48). This dispute arose when the Tribe wished to tax the sale of alcoholic beverages in Pender for the first time in 2006.

Given these facts, and the resulting justifiable expectations of the citizens of Pender, this Court should confirm that even under the *Solem* factors, the longstanding assumption of jurisdiction by the State over an area that is over 98% non-Indian, both in population and in land use, is entitled to considerable weight. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. at 215-16.

Finally, the court of appeals and district court did not, as Respondents allege, "[find] that the first factor . . . strongly suggests that Congress did not intend to diminish the Reservation." Br. in Opp. 12. On the contrary, the lower courts found the first factor unclear. (App. 6, 76). Moreover, Petitioners would suggest that if the statutory language was as clear as Respondents now claim, why did Respondents not assert jurisdiction between 1882 and 2006? If the language was so easily interpreted that way, why wasn't it? Instead in 1989, five years after *Solem*, the Department of the Interior confirmed the reservation was diminished and only in 2008, after this case started, did the Department state otherwise. (App. 42-44).

For over 130 years, the individuals who have chosen to reside in the Pender, Nebraska area and build homes, schools, and churches, open businesses and raise families, have developed justifiable expectations that the area in which they are doing these things was under the jurisdiction of the State of Nebraska. The Eighth Circuit's decision needlessly alters the status quo by precluding meaningful consideration of the third *Solem* factor. This exceptionally important issue warrants the Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 1st day of September, 2015.

DOUGLAS J. PETERSON
Nebraska Attorney General
RYAN S. POST
Counsel of Record
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
ryan.post@nebraska.gov

Attorneys for the State of Nebraska

GENE SUMMERLIN
MARNIE JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, Nebraska 68508
(402) 434-8040
gene.summerlin@huschblackwell.com
marnie.jensen@huschblackwell.com
mark.hill@huschblackwell.com

Attorneys for Individual & Village Petitioners

No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX, VOLUME I

JAMES D. SMITH
Solicitor General
of Nebraska
OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov
Counsel of Record
for Petitioners

DONALD B. VERRILLI, JR.
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel of Record for
Respondent United States

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Avenue, N.W.,
Seventh Floor
Washington, D.C. 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel of Record for
Tribal Respondents

Petition For Certiorari Filed May 27, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries from the United States District Court for the District of Nebraska, 4:07CV3101 1

Relevant Dockets Entries from the United States Court of Appeals for the Eighth Circuit, 14-1642 58

Second Amended Complaint, filed October 4, 2007 66

Omaha Tribal Court Memorandum Opinion and Order, filed February 14, 2013 77

Omaha Tribal Court Judgment, filed March 4, 2013 139

Letter from Deborah R. Gilg, United States Attorney for the District of Nebraska, to David Heineman, Governor of Nebraska, dated October 9, 2012, filed March 14, 2013 141

Order in *State v. Picotte*, Case No. CR 00-6 (D. Ct. Thurston County, Nebraska, August 21, 2000), filed April 22, 2013 145

Order in *State v. Picotte*, Case No. FE 99-23 (C. Ct. Thurston County, Nebraska, April 14, 2000), filed April 22, 2013 153

Nebraska Attorney General Memorandum dated July 23, 2001, filed April 22, 2013 157

Joint Stipulation of Facts, filed June 10, 2013 184

TABLE OF CONTENTS – Continued

Page

Act of August 7, 1882, 22 Stat. 341, filed June 14, 2013 227

Memorandum from Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, to Priscilla Wilfahrt, Twin Cities Field Solicitor dated September 5, 2012, filed June 14, 2013 234

VOLUME II

Complaint-In-Intervention of Intervenor State of Nebraska, filed June 17, 2013 285

Answer of Intervenor-Defendant United States to Plaintiffs' Second Amended Complaint, filed June 19, 2013 300

Expert Report submitted by Emily Greenwald, Ph.D., Historical Research Associates, Inc., filed June 24, 2013 315

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1867, filed June 24, 2013 374

General Land Office Survey, 1867, filed June 24, 2013 407

General Land Office Survey, 1867, filed June 24, 2013 408

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1869, filed June 24, 2013 409

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1871, filed June 24, 2013 413

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1872, filed June 24, 2013 430

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1873, filed June 24, 2013 443

Superintendents' Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1935 Annual Statistical Report, filed June 24, 2013 446

Excerpts from 13 Cong. Rec. 48 (1882), filed June 24, 2013 448

Excerpts from 13 Cong. Rec. 3077-79 (1882), filed June 24, 2013 457

Excerpts from 13 Cong. Rec. 3880 (1882), filed June 24, 2013 470

Excerpts from 13 Cong. Rec. 6842-43 (1882), filed June 24, 2013 471

Excerpts from 13 Cong. Rec. 6998 (1882), filed June 24, 2013 473

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1882, filed June 24, 2013 477

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1883, filed June 24, 2013 479

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1884, filed June 24, 2013 482

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1885, filed June 24, 2013 495

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1874, filed June 24, 2013 504

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1875, filed June 24, 2013 506

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1876, filed June 24, 2013 510

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1888, filed June 24, 2013 513

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1898, filed June 24, 2013 516

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1900, filed June 24, 2013 520

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1906, filed June 24, 2013 524

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1909, filed June 24, 2013 530

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1911, filed June 24, 2013 535

Superintendents' Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1935 Annual Statistical Report, filed June 24, 2013 540

VOLUME III

Declaration of Emily Greenwald, filed June 24, 2013 543

1905 Title Map of the Omaha Reservation, filed June 24, 2013 551

1885 Map of Omaha and Winnebago Reservations (for illustrative purposes), filed June 24, 2013 552

Act of February 28, 1899, 30 Stat. 912, filed June 24, 2013 553

Declaration of V. Gene Summerlin, filed June 24, 2013 559

1964 Bureau of Indian Affairs Maps, filed June 24, 2013 562

TABLE OF CONTENTS – Continued

Page

Rebuttal Expert Report submitted by Emily Greenwald, Ph.D., Historical Research Associates, Inc., filed June 24, 2013 565

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1884, filed June 24, 2013 612

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1871 616

Letter from the Secretary of the Interior to Congress, January 19, 1872, filed June 24, 2013 622

Act of June 10, 1872, 17 Stat. 391, filed June 24, 2013 631

Letter from the Commissioner of Indian Affairs, October 12, 1872, filed June 24, 2013 636

Excerpts from 13 Cong. Rec. 1282 (1882), filed June 24, 2013 640

Excerpts from 13 Cong. Rec. 3027-32 (1882), filed June 24, 2013 643

Excerpts from 13 Cong. Rec. 6383-84 (1882), filed June 24, 2013 685

Excerpts from 13 Cong. Rec. 6537-42 (1882), filed June 24, 2013 696

Excerpts from 13 Cong. Rec. 6571-73 (1882), filed June 24, 2013 736

Excerpts from 13 Cong. Rec. 6628 (1882), filed June 24, 2013 752

TABLE OF CONTENTS – Continued

Page

H. Rep. No. 1530, 47th Cong., 1st Sess. July 1, 1882, filed June 24, 2013 754

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1885, filed June 24, 2013 794

Report of Omaha and Winnebago Agency August 26, 1890, filed June 24, 2013 798

Report of Omaha and Winnebago Agency September 1, 1892, filed June 24, 2013 817

Report of Omaha and Winnebago Agency August 24, 1897, filed June 24, 2013 829

VOLUME IV

Report of Omaha and Winnebago Agency August 24, 1901, filed June 24, 2013 840

Report of Omaha and Winnebago Agency August 24, 1903, filed June 24, 2013 858

Expert Report submitted by R. David Edmunds, Ph.D., filed July 12, 2013 874

Letter from Clark W. Thompson and E. M. Furnas, Special Commissioners, to Wm. Dole, Commissioner of Indian Affairs dated March 10, 1865, filed July 12, 2013 1012

Letter from Commissioner to N. G. Taylor, Council Indian Affairs, Department of the Interior dated October 7, 1867, filed July 12, 2013 1013

TABLE OF CONTENTS – Continued

Page

1865 Treaty with the Omaha, filed July 12, 2013 1014

1854 Treaty with the Omaha, filed July 12, 2013 1019

Excerpts from Deposition of Emily Greenwald, Ph.D. taken August 8, 2012, filed July 12, 2013 1029

Historical Summary for Omaha Reservation dated November 30, 1961, filed July 12, 2013 1065

Excerpts from the Annual Report of the Secretary of the Interior for the Year 1896, filed July 12, 2013 1073

Report of Omaha and Winnebago Agency September 18, 1885, filed July 12, 2013 1075

Presbyterian Missionary Letter from John Copley to J.C. Lowie dated January 20, 1885, filed July 12, 2013 1079

Presbyterian Missionary Letter to Rev. John C. Lowie dated March 23, 1887, filed July 12, 2013 1081

Letter from the Secretary of the Interior to Congress dated February 10, 1888, filed July 12, 2013 1084

Excerpts from the Annual Report of the Department of the Interior for the Year 1897, filed July 12, 2013 1088

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Department of the Interior for the Year 1899, filed July 12, 2013 1099

VOLUME V

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1880, filed July 12, 2013 1118

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1881, filed July 12, 2013 1120

Legislative Resolution 37, 80th Neb. Leg. (1969), filed July 12, 2013 1122

35 FR 16598 (1970), filed July 12, 2013 1125

Excerpts from the Thurston County, Nebraska Website dated May 28, 2012, filed July 12, 2013 ... 1127

Diagram Showing the Township Lines, Guide Meridian, 6th Standard Parallel and the Boundary Lines of the Omaha and Winnebago Ind. Res. in Nebraska, dated January 31, 1884, filed July 12, 2013 1129

Bureau of Indian Affairs Map of Omaha Reservation dated August 3, 1994, filed July 12, 2013 1130

Memorandum from Cora L. Jones, Area Director, Aberdeen Area, to Superintendent of the Winnebago Agency dated August 13, 1999, filed July 12, 2013 1131

TABLE OF CONTENTS – Continued

Page

Bureau of Indian Affairs Map of Omaha Reservation, dated March 28, 1999, filed July 12, 2013 1133

Bureau of Indian Affairs Map of Winnebago and Omaha Reservations, dated May 16, 2000, filed July 12, 2013 1134

Letter from Robert A. LaMacchia, Chief of the Geography Division of the U.S. Census Bureau, to Teri D. Lamplot, Chair of the Board of County Supervisors, dated May 8, 2007, filed July 12, 2013 1135

U.S. Census Bureau Maps of Pender Village for the Year 2000 Census, filed July 12, 2013 1137

Letter from Robert A. LaMacchia, Chief of the Geography Division of the U.S. Census Bureau, to Teri D. Lamplot, Chair of the Board of County Supervisors, dated May 8, 2007, filed July 12, 2013 1139

Nebraska Revenue Ruling 99-92-1 dated March 6, 1992, filed July 12, 2013 1141

Letter from Janet A. Lake, Administrator of the Nebraska Department of Revenue Motor Fuels Division, to Benjamin W. Thompson dated September 22, 2005, filed July 12, 2013 1145

Agreement for the Collection and Dissemination of Motor Fuel Taxes Between the State of Nebraska and the Omaha Tribe of Nebraska, filed July 12, 2013 1146

TABLE OF CONTENTS – Continued

Page

Declaration of Maurice R. Johnson, filed July 12, 2013 1159

Declaration of Amen Sheridan, filed July 12, 2013.... 1162

Consent Agreement and Final Order In the Matter of Krusemark Ag, Inc., U.S. Environmental Protection Agency, dated December 1, 2009, filed July 12, 2013..... 1165

U.S. Environmental Protection Agency Fact Sheet Regarding Discharge Permits for Concentrated Animal Feeding Operations in the Omaha and Winnebago Reservations, dated December 2007, filed July 12, 2013 1174

Map from the Winnebago Agency, filed July 12, 2013 1178

Declaration of Thomas Saunsoci, filed July 12, 2013 1179

Opinion of Marcia M. Kimball, Bureau of Indian Affairs, dated June 27, 1989, filed July 12, 2013 1182

Opinion of Priscilla Wilfahrt, Bureau of Indian Affairs, dated April 24, 2008, filed July 12, 2013 1195

Memorandum from Patrice H. Kunseh, Deputy Solicitor of Indian Affairs, to Priscilla Wilfahrt, Field Solicitor, dated April 16, 2012, filed July 12, 2013 1250

Rebuttal Expert Report submitted by R. David Edmunds, Ph. D., filed July 12, 2013..... 1251

TABLE OF CONTENTS – Continued

Page

Index of Evidence in Support of Motion of State of Nebraska for Leave to File Additional Evidence, filed July 23, 2013 1295

1883 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1298

1888 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1299

1892 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1300

1886 Map of Nebraska Published by the Burlington Route, filed July 23, 2013 1301

1889 Railway Map of Nebraska Issued by the State Board of Transportation, filed July 23, 2013 1302

1908 Outline Map of Cuming County from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1303

1908 Outline Map of Grant Township from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1304

1908 Outline Map of Bancroft Township from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1305

TABLE OF CONTENTS – Continued

Page

1885 Map of Omaha and Winnebago Reservation Lands, from the Official State Atlas of Nebraska. Compiled from Government Surveys, County Records, and Personal Investigations, filed July 23, 2013 1306

S. 1255, H. Rep. No. 1530, 47th Cong., 1st Sess. April 27, 1882, filed July 8, 2014 1307

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD SMITH, et al., **Plaintiffs,** **and** **STATE OF NEBRASKA,** **Plaintiff-Intervenor,** **v.** **MITCH PARKER, et al.,** **Defendants,** **and** **THE UNITED STATES,** **Defendant-Intervenor.**	**Case No. 4:07CV3101** **Relevant Docket Entries**

DOCKET PROCEEDINGS

Entry #:	Date:	Description
157	10/05/2015	LETTER (COPY) FROM USCA – 8TH CIRCUIT THAT THE PETITION FOR WRIT OF CERTIORARI IS GRANTED U.S. SUPREME COURT NUMBER 14-1406. (ATTACHMENTS: # 1 LETTER FROM SUPREME COURT) (GJG) (ENTERED: 10/05/2015)

156	06/03/2015	LETTER (COPY) FROM USCA – 8TH CIRCUIT (14-1642) THAT THE PETITION FOR WRIT OF CERTIORARI HAS BEEN FILED, U.S. SUPREME COURT NUMBER 14-1406. (ATTACHMENTS: # 1 TRANSMITTAL LETTER) (GJG) (ENTERED: 06/03/2015)
155	03/05/2015	MANDATE/JUDGMENT FROM USCA – 8TH CIRCUIT (14-1642) AFFIRMING THE DECISION OF THE DISTRICT COURT REGARDING NOTICE OF APPEAL TO USCA, 145. IN ACCORDANCE WITH THE OPINION AND JUDGMENT OF 12/19/2014, AND PURSUANT TO THE PROVISIONS OF FEDERAL RULE OF APPELLATE PROCEDURE 41(A), THE FORMAL MANDATE IS HEREBY ISSUED IN THE ABOVE-STYLED MATTER. (GJG) (ENTERED: 03/12/2015)
154	03/05/2015	COPY OF ORDER FROM USCA – 8TH CIRCUIT (14-1642). APPELLANTS' JOINT MOTION TO STAY THE ISSUANCE OF MANDATE PENDING PETITION FOR CERTIORARI HAS BEEN CONSIDERED BY THE COURT AND IS DENIED. JUDGE BEAM WOULD

		GRANT THE MOTION TO STAY. (GJG) (ENTERED: 03/05/2015)
153	02/26/2015	COPY OF ORDER FROM USCA – 8TH CIRCUIT (14-1642). THE PETITION FOR REHEARING EN BANC IS DENIED. THE PETITION FOR REHEARING BY THE PANEL IS ALSO DENIED. (GJG) (ENTERED: 02/26/2015)
152	12/19/2014	COPY OF JUDGMENT FROM USCA – 8TH CIRCUIT 14-1642. AFTER CONSIDERATION, IT IS HEREBY ORDERED AND ADJUDGED THAT THE JUDGMENT OF THE DISTRICT COURT IN THIS CAUSE IS AFFIRMED IN ACCORDANCE WITH THE OPINION 151 OF THIS COURT. (NMW) (ENTERED: 12/19/2014)
151	12/19/2014	COPY OF OPINION OF USCA – 8TH CIRCUIT (14-1642) REGARDING NOTICE OF APPEAL TO USCA, 145. (ATTACHMENTS: # 1 TRANSMITTAL LETTER # 2 LETTER TO PUBLISHER) (NMW) (ENTERED: 12/19/2014)
150	06/19/2014	COPY OF ORDER FROM USCA – 8TH CIRCUIT (14-1642) THE PARTIES TO THIS

APPEAL HAVE EXECUTED A STIPULATION SETTING FORTH THE PROVISIONS FOR A STAY OF THE DISTRICT COURT'S FINAL ORDER AND JUDGMENT IN THIS CASE. THE MOTION FOR A STAY OF THE DISTRICT COURT'S FINAL ORDER AND JUDGMENT PENDING RESOLUTION OF THIS APPEAL IS GRANTED. PURSUANT TO THE PROVISIONS OF THE STIPULATION, THIS STAY SHALL REMAIN IN EFFECT UNTIL THIS COURT ISSUES ITS MANDATE IN THIS MATTER. THE TERMS AND PROVISIONS OF THE STIPULATION AS SET FORTH IN THE MOTION ARE HEREBY INCORPORATED AS PART OF THIS ORDER. (ATTACHMENTS: # 1 STIPULATED MOTION AND PROPOSED ORDER TO STAY PENDING RESOLUTION OF PLAINTIFFS' APPEAL OF THE FINAL ORDER AND JUDGMENT FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA) (TCL) (ENTERED: 06/20/2014)

146	03/14/2014	NOTIFICATION OF APPEAL AND NOA SUPPLEMENT BY CLERK TO USCA REGARDING MEMORANDUM AND ORDER 140, AND JUDGMENT, 141, NOTICE OF APPEAL TO USCA, 145. NOTICE OF APPEAL FILED ON 3/13/2014 BY PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH, INTERVENOR PLAINTIFF STATE OF NEBRASKA. NOTIFICATION TO COUNSEL AND PARTIES – FILE REQUEST FOR TRANSCRIPT WITH THE DISTRICT COURT CLERKS OFFICE. (GJG) (ENTERED: 03/14/2014)
145	03/13/2014	NOTICE OF APPEAL REGARDING ORDER ON MOTION FOR SUMMARY JUDGMENT,,,,,,,,, 140, JUDGMENT,,, 141 BY ATTORNEY MARK D. HILL ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF

		PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. FILING FEE $ 505, RECEIPT NUMBER 0867-2667152. (HILL, MARK) (ENTERED: 03/13/2014)
141	02/13/2014	JUDGMENT – PURSUANT TO THE MEMORANDUM AND ORDER FILED THIS DATE, FILING 140, FINDING THAT THE 47TH CONGRESS'S ACT OF AUGUST 7, 1882, 22 STAT. 341, DID NOT DIMINISH THE BOUNDARIES OF THE OMAHA INDIAN RESERVATION AS THEY EXISTED AT THAT TIME AND DENYING PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S REQUESTS FOR DECLARATORY AND INJUNCTIVE RELIEF FROM THE OMAHA INDIAN TRIBE'S ATTEMPT TO ENFORCE AGAINST DEFENDANTS THE OMAHA TRIBE'S BEVERAGE CONTROL ORDINANCE, AS AMENDED, 71 FED. REG. 10056 (FEB. 28, 2006). JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANTS AND DEFENDANT-INTERVENOR AND AGAINST PLAINTIFFS

		AND PLAINTIFF-INTERVENOR, PROVIDING THAT: (1) PLAINTIFFS AND PLAINTIFF-INTERVENOR SHALL TAKE NOTHING; AND (2) THE TEMPORARY RESTRAINING ORDER PROHIBITING THE ENFORCEMENT OF THE OMAHA TRIBES BEVERAGE CONTROL ORDINANCE IN PENDER, NEBRASKA, WHICH WAS LATER EXTENDED BY A STIPULATION OF THE PARTIES, IS DISSOLVED. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (GJG) (ENTERED: 02/13/2014)
140	02/13/2014	MEMORANDUM AND ORDER – BECAUSE THE 47TH CONGRESS'S ACT OF AUGUST 7, 1882, 22 STAT. 341, DID NOT DIMINISH THE BOUNDARIES OF THE OMAHA INDIAN RESERVATION AS THEY EXISTED AT THAT TIME, THE MOTION FOR SUMMARY JUDGMENT (FILING 116) FILED BY PLAINTIFFS REQUESTING DECLARATORY AND INJUNCTIVE RELIEF FROM THE OMAHA INDIAN TRIBE'S ATTEMPT TO ENFORCE THE OMAHA TRIBE'S

BEVERAGE CONTROL ORDINANCE, AS AMENDED, 71 FED. REG. 10056 (FEB. 28, 2006), AGAINST DEFENDANTS IS DENIED. THE MOTION FOR SUMMARY JUDGMENT (FILING 113) FILED BY DEFENDANTS IS GRANTED. THE TEMPORARY RESTRAINING ORDER PROHIBITING THE ENFORCEMENT OF THE OMAHA TRIBES BEVERAGE CONTROL ORDINANCE IN PENDER, NEBRASKA, WHICH WAS LATER EXTENDED BY A STIPULATION OF THE PARTIES (FILINGS 16 & 29), IS DISSOLVED. THE STATE OF NEBRASKA'S CLAIMS AS PLAINTIFF-INTERVENOR ARE MOOTED BY MY FINDING THAT THE 1882 ACT DID NOT DIMINISH THE OMAHA INDIAN RESERVATION. JUDGMENT IN FAVOR OF DEFENDANTS AND DEFENDANT-INTERVENOR AND AGAINST PLAINTIFFS AND PLAINTIFF-INTERVENOR PROVIDING THAT PLAINTIFFS AND PLAINTIFF-INTERVENOR SHALL TAKE NOTHING SHALL BE ENTERED BY

		SEPARATE DOCUMENT. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (GJG) (ENTERED: 02/13/2014)
139	08/29/2013	INDEX IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 116 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (ATTACHMENTS: # 1 EXHIBIT EXHIBIT 1 – EXCERPTS OF DEPOSITION OF E. GREENWALD, PH.D. TAKEN 8-8-12, # 2 EXHIBIT EXHIBIT 2 – FOUNDATIONAL DECLARATION OF NORA M. KANE) (KANE, NORA) (ENTERED: 08/29/2013)
138	08/29/2013	BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT 116 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER.(KANE,

		NORA) (ENTERED: 08/29/2013)
137	08/29/2013	INDEX IN OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (SUMMERLIN, V.) (ENTERED: 08/29/2013)
136	08/29/2013	REPLY BRIEF IN OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR SUMMARY JUDGMENT BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (SUMMERLIN, V.) (ENTERED: 08/29/2013)

135	08/29/2013	BRIEF IN OPPOSITION TO BRIEF 126 OF PLAINTIFF-INTERVENOR THE STATE OF NEBRASKA BY ATTORNEY DARON CARREIRO ON BEHALF OF INTERVENOR DEFENDANT UNITED STATES. (CARREIRO, DARON) (ENTERED: 08/29/2013)
134	08/29/2013	BRIEF IN OPPOSITION TO BRIEF 127 OF DEFENDANT-INTERVENOR UNITED STATES BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(POST, RYAN) (ENTERED: 08/29/2013)
130	08/13/2013	ORDER – THE MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE (FILING 121) FILED BY THE PLAINTIFF-INTERVENOR STATE OF NEBRASKA IS GRANTED, AND THE UNDERSIGNED WILL CONSIDER EXHIBITS 2 THROUGH 9 FILED IN SUPPORT OF THE MOTION (FILINGS 123-2 TO 123-9) AS PART OF THE RECORD WITH THE UNDERSTANDING THAT (A) EXHIBITS 2 THROUGH 4 ARE PRESENTED BY THE STATE OF NEBRASKA, AND (B)

		EXHIBITS 5 THROUGH 9 ARE PRESENTED BY THE DEFENDANTS IN REBUTTAL. THE HIGHEST QUALITY IMAGES OF THE MAPS ARE PRESENTED AT THE URL LOCATIONS SHOWN IN THE MOTION, AND THE COURT MAY VIEW SUCH IMAGES OVER THE INTERNET WHEN REVIEWING THE RECORD. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (GJG) (ENTERED: 08/13/2013)
129	08/08/2013	REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE 121 BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(POST, RYAN) (ENTERED: 08/08/2013)
128	08/07/2013	BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE 121 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (KANE, NORA) (ENTERED: 08/07/2013)

127	07/29/2013	BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 113 BY ATTORNEY DARON CARREIRO ON BEHALF OF INTERVENOR DEFENDANT UNITED STATES. (ATTACHMENTS: # 1 EXHIBIT) (CARREIRO, DARON) (ENTERED: 07/29/2013)
126	07/29/2013	BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 116 BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(POST, RYAN) (ENTERED: 07/29/2013)
123	07/23/2013	INDEX IN SUPPORT OF BRIEF 122 IN SUPPORT OF MOTION FOR LEAVE BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA. (ATTACHMENTS: # 1 AFFIDAVIT RYAN S. POST, # 2 EXHIBIT 2, # 3 EXHIBIT 3, # 4 EXHIBIT 4, # 5 EXHIBIT 5, # 6 EXHIBIT 6, # 7 EXHIBIT 7, # 8 EXHIBIT 8, # 9 EXHIBIT 9, # 10 EXHIBIT 10) (POST, RYAN) (ENTERED: 07/23/2013)

122	07/23/2013	BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE 121 BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(POST, RYAN) (ENTERED: 07/23/2013)
121	07/23/2013	MOTION FOR LEAVE TO FILE ADDITIONAL EVIDENCE BY ATTORNEY RYAN S. POST ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(POST, RYAN) (ENTERED: 07/23/2013)
120	07/12/2013	INDEX IN SUPPORT OF DEFENDANTS' EVIDENCE OFFERED AND RECEIVED BY THE TRIBAL COURT DURING SUMMARY JUDGMENT BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (ATTACHMENTS: # 1 EXHIBIT 1. PLAINTIFFS' SPECIAL APPEARANCE AND COMPLAINT FOR DECLARATIVE AND INJUNCTIVE RELIEF, # 2 EXHIBIT 2. PLAINTIFFS' SECOND AMENDED COMPLAINT.

(ECF 55), # 3 EXHIBIT 3. MEMORANDUM & ORDER. (ECF 53), # 4 EXHIBIT 4. DEFENDANTS' EXPERT REPORT: "THE BEST FARMING LAND IN THAT REGION": LAND, BOUNDARIES, AND RESIDENCY ON THE OMAHA INDIAN RESERVATION IN NEBRASKA, A REPORT SUBMITTED BY R. DAVID EDMUNDS, PH.D. (MAY 23, 2012), # 5 EXHIBIT 5.1854 TREATY WITH THE OMAHA, 10 STAT. 1043, MAR. 16, 1854, RATIFIED APR. 17, 1854, PROCLAIMED JUNE 21, 1854 [ENDNOTE 19, EDMUNDS RPT.], # 6 EXHIBIT 6.1865 TREATY WITH THE OMAHA, 14 STAT. 667, MAR. 6, 1965, RATIFIED FEB. 13, 1866, PROCLAIMED FEB. 15, 1866 [ENDNOTE 33, EDMUNDS RPT.], # 7 EXHIBIT 7. JANNEY TO ELI S. PARKER, NOVEMBER 8, 1870, M234, ROLL 605, 1125-1126; OMAHA CHIEFS TO CONGRESS, OCTOBER 27, 1871, IBID., ROLL 606, 135-136; BOUGHTER, BETRAYING THE OMAHA NATION, PP. 92-93 [ENDNOTE 42, EDMUNDS RPT.], # 8 EXHIBIT 8. ACT OF

AUG. 7, 1882, CH. 434, 22 STAT. 341 (PROVIDING FOR THE SALE OF A PART OF THE OMAHA RESERVATION) [ENDNOTE 122, EDMUNDS RPT.], # 9 EXHIBIT 9. "TREATY WITH THE OMAHA," MARCH 16, 1854, KAPPLER, INDIAN TREATIES, PP. 611-614; ARTICLES OF AN AGREEMENT BETWEEN THE OMAHA INDIANS AND THE SIOUX CITY AND NEBRASKA RAILROAD COMPANY, APRIL 19, 1880, BIA, ABERDEEN OFFICE, LAND TITLE RECORDS, 380/662. ALSO SEE WILLIAM J. POLLOCK TO CARL SCHURZ, APRIL 20, 1880, IBID., RAILROAD NEGOTIATIONS [ENDNOTE 62, EDMUNDS RPT.], # 10 EXHIBIT 10. EXCERPTS OF DR. EMILY GREENWALD DEPOSITION TAKEN 8-8-2012, # 11 EXHIBIT 11. "HISTORICAL SUMMARY FOR OMAHA RESERVATION," NOVEMBER 30, 1961, IN NARS-KC, WINNEBAGO AGENCY, ACCESS 75-92-1-7, BOX 246-247-325, P. 4-7. BOLD TYPE IN TEXT IN ORIGINAL. [ENDNOTE 215, EDMUNDS RPT.],

12 EXHIBIT 12. OMAHAS TO THE EDITOR, THE COUNCIL FIRE, FEBRUARY 5, 1878, VOL. 1, (MARCH, 1878), P. 42; TAWA-GAXE-JUNGA TO A. B. MEACHAM, JANUARY 16, 1879, IN DORSEY, CEGIHA LANGUAGE, 717-718; OMAHAS TO THE CINCINNATI COMMERCIAL, (1879), IN IBID., 755-762; MEMORIAL OF THE MEMBERS OF THE OMAHA TRIBE OF INDIANS FOR A GRANT OF LANDS IN SEVERALTY, JANUARY, 11, 1882, U. S. CONGRESS, SENATE MISCELLANEOUS DOCUMENT NO 31, 47TH CONG . . . , 1ST SESSION. PP. 1-12; BOUGHTER, BETRAYING THE OMAHA NATION, PP. 92, 99. [ENDNOTE 56, EDMUNDS RPT.], # 13 EXHIBIT 13. MARK, A STRANGER IN HER NATIVE LAND, P. 89; BOUGHTER, BETRAYING THE OMAHA NATION, P. 104. [ENDNOTE 155, EDMUNDS RPT.], # 14 EXHIBIT 14. ARCIA FOR 1885, P. LXII. [ENDNOTE 141, EDMUNDS RPT.], # 15 EXHIBIT 15. "AN ACT AUTHORIZING THE SECRETARY OF THE

INTERIOR TO EXTEND THE TIME OF PAYMENT TO PURCHASERS OF LANDS OF THE OTOE AND MISSOURIA AND OF THE OMAHA INDIANS," AUGUST 2, 1886, IN ARCIA, 1886, P. 276. [ENDNOTE 132, EDMUNDS RPT], # 16 EXHIBIT 16. "AN ACT FOR THE RELIEF OF THE OMAHA TRIBE OF INDIANS IN NEBRASKA, TO EXTEND TIME OF PAYMENT TO PURCHASERS OF LANDS OF SAID INDIANS, AND FOR OTHER PURPOSES," MAY 15, 1888, U. S. CONGRESS, STATUTES AT LARGE, 25, PP. 150-151. [ENDNOTE 134, EDMUNDS RPT.], # 17 EXHIBIT 17 "AN ACT EXTENDING THE TIME OF PAYMENT TO PURCHASERS OF LAND OF THE OMAHA TRIBE OF INDIANS IN NEBRASKA, AND FOR OTHER PURPOSES. AUGUST 19, 1890, IN ARCIA, 1890, P. 894. [ENDNOTE 136, EDMUNDS RPT.], # 18 EXHIBIT 18. "REPORT FROM THE COMMITTEE ON INDIAN AFFAIRS, MARCH 8, 1890, U. S. CONGRESS, HOUSE OF REPRESENTATIVES, 51ST CONGRESS, 1ST

SESSION, REPORT NO. 721, P. 1; REPORT FROM THE COMMITTEE ON INDIAN AFFAIRS, JULY 11, 1890, U. S. CONGRESS, HOUSE OF REPRESENTATIVES, 51ST CONGRESS, 1ST SESSION, REPORT 2684, P. 1; REPORT FROM THE COMMITTEE ON INDIAN AFFAIRS, JULY 12, 1890, U. S. CONGRESS, SENATE, 51ST CONGRESS, 1ST SESSION, REPORT 1491, PP. 1-2. [ENDNOTE 137, EDMUNDS RPT.], # 19 EXHIBIT 19. "AN ACT EXTENDING THE TIME OF PAYMENT TO PURCHASERS OF LANDS OF THE OMAHA INDIANS IN NEBRASKA, AND FOR OTHER PURPOSES," AUGUST 11, 1894, IN ARCIA, 1894, P. 438. ALSO SEE TIME OF PAYMENT FOR LANDS OF OMAHA INDIANS IN NEBRASKA, REPORT FROM THE COMMITTEE ON INDIAN AFFAIRS, MAY 24, 1894, U. S. CONGRESS, HOUSE OF REPRESENTATIVES, 53RD CONGRESS, 2ND SESSION, REPORT NO. 958, PP. 1-3. [ENDNOTE 138, EDMUNDS RPT.], # 20 EXHIBIT 20. "EXTENSION OF

PAYMENTS FOR OMAHA LANDS," IN ARCIA, 1896, P. 88. [ENDNOTE 139, EDMUNDS RPT.], # 21 EXHIBIT 21. ARCIA FOR 1885, P. LXII. GEORGE WILKINSON TO THE COMMISSIONER, SEPTEMBER 18, 1885, PP. 135-136 [ENDNOTE 142, EDMUNDS REPORT]., # 22 EXHIBIT 22. PRESBYTERIAN MISSIONARY LETTERS: JOHN COPLEY TO J. C. LOWIE, JANUARY 20, 1885, BOX H, LETTER 207; WILLIAM HAMILTON TO JOHN C. LOWIE, MARCH 23, 1887, BOX F, LETTER 123. [ENDNOTE 143, EDMUNDS RPT.], # 23 EXHIBIT 23. "LETTER FROM THE SECRETARY OF THE INTERIOR TRANSMITTING, IN RESPONSE TO SENATE RESOLUTION 31, 1888, INFORMATION RELATIVE TO SALE OF LANDS IN THE OMAHA RESERVATION," FEBRUARY 14, 1888, U. S. CONGRESS, SENATE, 50TH CONGRESS, 1ST SESSION, EXECUTIVE DOCUMENT NO. 77, PP. 1-2; S.M. STOCKSLAGER TO WILLIAM F. VILAS, FEBRUARY 9, 1888, IN IBID.; H.L. MULDROW TO

THE PRESIDENT OF THE SENATE PRO TEMPORE, FEBRUARY 10, 1888, IN IBID. [ENDNOTE 133, EDMUNDS RPT.], # 24 EXHIBIT 24. W.A. MERCER TO THE COMMISSIONER OF INDIAN AFFAIRS, AUGUST 24, 1897, IN, PP. 178-180; CHARLES P. MATHEWSON TO THE COMMISSIONER OF INDIAN AFFAIRS, AUGUST 31, 1899, IN IBID., 1899, PP. 231-235. OFFICIAL BUREAU OF INDIAN AFFAIRS ACREAGE REPORTS FOR THE OMAHA RESERVATION IN BOTH 1880 AND 1881, BEFORE THE PASSAGE OF THE 1882 LAND ACT, LISTED THE OMAHA INDIAN RESERVATION AS CONTAINING 143,225 ACRES. SEE SCHEDULE SHOWING THE NAMES OF INDIAN RESERVATIONS IN THE UNITED STATES; AGENCIES, ETC. IN ARCIA, 1880, P. 233; IBID., 1881, P. 266 [ENDNOTE 144, EDMUNDS RPT.], # 25 EXHIBIT 25. OPINION BY E. A. HITCHCOCK, JUNE 23, 1900, 30, PUBLIC LANDS, DEC. 82, 1900 WL 1827 (D.O.I). [ENDNOTE 140, EDMUNDS RPT.], # 26 EXHIBIT 26.

RACHEL BECK TO EDWARD FARLEY, AUGUST 21, 1894, LA FLESCHE PAPERS, NEBRASKA STATE HISTORICAL SOCIETY; ENTRY FOR MARCH 16, 1898, ROSALIE FARLEYS DIARY, IBID. ALSO SEE INASKA (DENNIS HASTINGS) AND MARGERY COFFEY (MIONBATHIN), GRANDFATHER REMEMBERS: BROKEN TREATIES/ STOLEN LAND: THE OMAHA LAND THEFT (UNPUBLISHED PH.D. DISSERTATION, WESTERN INSTITUTE OF SOCIAL RESEARCH, 2009), P. 791. [ENDNOTE 174, EDMUNDS RPT.], # 27 EXHIBIT 27. FREDERICK E. HOXIE, "THOMAS SLOAN AND THE 'GOOD CITIZENSHIP GUN,'" PP. 17, 24. THIS IS AN UNPUBLISHED MANUSCRIPT IN THE POSSESSION OF FREDERICK E. HOXIE. ALSO SEE INASKA AND COFFEY, "GRANDFATHER REMEMBERS," P. 751. [ENDNOTE 175, EDMUNDS RPT.], # 28 EXHIBIT 28. HOXIE, "THOMAS SLOAN," PP. 26, 32; THE PENDER TIMES, OCTOBER 29, 1901, P. 1.; INASKA AND

COFFEY, "GRANDFATHER REMEMBERS," P. 751. [ENDNOTE 177, EDMUNDS RPT.], # 29 EXHIBIT 29. THE PENDER TIMES, OCTOBER 29, 1909, P. 1. [ENDNOTE 176, EDMUNDS RPT.], # 30 EXHIBIT 30. RETROCESSION OF JURISDICTION LEGISLATION, # 31 EXHIBIT 31. NOTICE OF ACCEPTANCE OF RETROCESSION OF JURISDICTION DATED OCTOBER 25, 1970, # 32 EXHIBIT 32. THURSTON COUNTY 1963 MAP, # 33 EXHIBIT 33. HTTP:// THURSTONCOUNTY NEBRASKA.US/WEBPAGES/ HISTORY/ HISTORY.HTML. [ENDNOTE 251, EDMUNDS RPT.], # 34 EXHIBIT 34. "DIAGRAM SHOWING THE TOWNSHIP LINES, GUIDE MERIDIAN, 6TH STANDARD PARALLEL AND THE BOUNDARY LINES OF THE OMAHA AND WINNEBAGO IND. RES. IN NEBRASKA," JANUARY 31, 1884. [ENDNOTE 214, EDMUNDS RPT.], # 35 EXHIBIT 35. OFFICIAL STATE OF NEBRASKA HIGHWAY MAP, 1971. [ENDNOTE 208, EDMUNDS RPT.], # 36 EXHIBIT 36.

OFFICIAL STATE OF NEBRASKA HIGHWAY MAP, 1972. [ENDNOTE 209, EDMUNDS RPT.], # 37 EXHIBIT 37. OFFICIAL STATE OF NEBRASKA HIGHWAY MAP, 1975. [ENDNOTE 210, EDMUNDS RPT.], # 38 EXHIBIT 38. MAP OF OMAHA INDIAN RESERVATION, BIA, ABERDEEN OFFICE, SURFACE OWNERSHIP, AUGUST 3, 1994. [ENDNOTE 218, EDMUNDS RPT.], # 39 EXHIBIT 39. AREA DIRECTOR, ABERDEEN AREA TO SUPERINTENDENT, WINNEBAGO AGENCY, AUGUST 13, 1999, BIA, ABERDEEN OFFICE, REAL PROPERTY MANAGEMENT, MC-306. [ENDNOTE 219, EDMUNDS RPT.], # 40 EXHIBIT 40. "OMAHA RESERVATION, USDI-BIA ABERDEEN AREA, GIS, LAND OWNERSHIP STATUS AS OF AUGUST 8, 1996." THIS MAP CONTAINS A NOTATION THAT IT WAS COMPILED ON MARCH 28, 1999. ALSO SEE "WINNEBAGO-OMAHA RESERVATIONS, LAND OWNERSHIP STATUS AS OF 10-09-99, BUREAU OF

INDIAN AFFAIRS, BRANCH OF REALTY, USDI-BIA GREAT PLAINS REGIONAL GIS, MAY 16, 2000; AND ROBERT LAMACCHIA TO TERI LAMPLOT, MAY 8, 2007. [ENDNOTE 220, EDMUNDS RPT.], # 41 EXHIBIT 41. MAP OF PENDER VILLAGE (38750), OMAHA RESERVATION (2550), U. S. CENSUS BUREAU, U. S. DEPT. OF COMMERCE, JANUARY 1, 2000; MAP OF PENDER TOWNSHIP (38767), OMAHA RESERVATION (2550), U. S. CENSUS BUREAU, U. S. DEPT. OF COMMERCE, JANUARY 1, 2000. [ENDNOTE 221, EDMUNDS RPT.], # 42 EXHIBIT 42. LETTER FROM MS. LAMPLOT, WHILE CHAIR OF THE CTY. BD. OF SUPERVISORS FOR THURSTON CTY. TO U.S. CENSUS BUREAU REGARDING REVISION OF OMAHA RESERVATION BOUNDARIES DATED 10 16-07, # 43 EXHIBIT 43. ROBERT LAMACCHIA TO TERI LAMPLOT, MAY 8, 2007. [ENDNOTE 222, EDMUNDS RPT.], # 44 EXHIBIT 44. MARK CASEY TO ROSE BRAUN, AUGUST 5,

2003, ARCHIVES, NEBRASKA DEPARTMENT OF ROADS, LINCOLN, NEBRASKA. [ENDNOTE 211, EDMUNDS RPT.], # 45 EXHIBIT 45. OFFICIAL STATE OF NEBRASKA HIGHWAY MAP, 2007. [ENDNOTE 212, EDMUNDS RPT.], # 46 EXHIBIT 46. 2007 BOUNDARY AND ANNEXATION SURVEY MAP, CUMING AND THURSTON COUNTIES (173), U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, JANUARY 1, 2007; INDEX FOR 2007 BOUNDARY AND ANNEXATION SURVEY MAPS, BASENTITY-ID 23117300000, THURSTON COUNTY (173), U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, 2007; 2008 BOUNDARY AND ANNEXATION SURVEY (BAS): PENDER VILLAGE, (38750), U. S. CENSUS BUREAU, U. S. DEPT. OF COMMERCE, FEBRUARY 12, 2008. [ENDNOTE 224, EDMUNDS RPT.], # 47 EXHIBIT 47. NEBRASKA REVENUE RULING DATED 3-6-1992, # 48 EXHIBIT 48. CORRESPONDENCE TO THE NEBRASKA DEPARTMENT

OF ROADS FROM THE OMAHA TRIBE REGARDING SIGNAGE REQUESTS, 2002-2003, # 49 EXHIBIT 49. AGREEMENT FOR THE COLLECTION AND DISSEMINATION OF MOTOR FUEL TAXES BETWEEN THE STATE OF NEBRASKA AND THE OMAHA TRIBE OF NEBRASKA WITH FAQS SHEET, # 50 EXHIBIT 50. DECLARATION OF MAURICE R. JOHNSON DATED 8-7-2012, # 51 EXHIBIT 51. DECLARATION OF AMEN SHERIDAN DATED 8-9-2012, # 52 EXHIBIT 52. DECLARATION OF THOMAS SAUNSOCI DATED 8-10-2012, # 53 EXHIBIT 53. MARCIA KIMBALL TO DAVID JAEGER, JUNE 27, 1989, BIA, ABERDEEN OFFICE, BRANCH OF REALTY. [ENDNOTE 225, EDMUNDS RPT.], # 54 EXHIBIT 54. PATRICE KUNESH TO PRISCILLA WILFAHRT, APRIL 16, 2012, BIA, INCOMING CORRESPONDENCE FILE, WINNEBAGO AGENCY. [ENDNOTE 226, EDMUNDS RPT.], # 55 EXHIBIT 55. PRISCILLA WILFAHRT TO

ALICE HARWOOD, APRIL 24, 2008, LETTERS RECEIVED, BIA, GREAT PLAINS REGIONAL OFFICE, ABERDEEN, SOUTH DAKOTA. [ENDNOTE 227, EDMUNDS RPT.], # 56 EXHIBIT 56. KUNESH TO WILFAHRT, APRIL 16, 2012, BIA, INCOMING CORRESPONDENCE FILE, WINNEBAGO AGENCY. [ENDNOTE 228, EDMUNDS RPT.], # 57 EXHIBIT 57. FOUNDATIONAL DECLARATION OF NORA M. KANE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, # 58 EXHIBIT 58. OMAHAS TO THE EDITOR, THE COUNCIL FIRE, FEBRUARY 5, 1878, VOL. 1, (MARCH, 1878), P. 42; TAWA-GAXE-JUNGA TO A. B. MEACHAM, JANUARY 16, 1879, IN DORSEY, CEGIHA LANGUAGE, 717-718; OMAHAS TO THE CINCINNATI COMMERCIAL, (1879), IN IBID., 755-762; MEMORIAL OF THE MEMBERS OF THE OMAHA TRIBE OF INDIANS FOR A GRANT OF LANDS IN SEVERALTY, JANUARY, 11, 1882, U. S. CONGRESS, SENATE

MISCELLANEOUS DOCUMENT NO 31, 47TH CONG . . , 1ST SESSION. PP. 1-12; BOUGHTER, BETRAYING THE OMAHA NATION, PP. 92, 99 [ENDNOTE 56, EDMUNDS RPT.], # 59 EXHIBIT 59. GEORGE WILKINSON TO THE COMMISSIONER OF INDIAN AFFAIRS, SEPTEMBER 29, 1882, IN ARCIA, 1882, 112-113. [END-NOTE 55, EDMUNDS RPT.], # 60 EXHIBIT 60. DEFEN-DANTS' EXPERT'S REBUT-TAL REPORT: "REBUTTAL OF 'THE WESTERN BOUNDARY OF THE OMAHA INDIAN RESERVATION' WRITTEN BY EMILY GREENWALD," A REBUTTAL DOCUMENT SUBMITTED BY R. DAVID EDMUNDS, PH.D. (MAY 31, 2012), # 61 EXHIBIT 61. FOUNDATIONAL DECLARA-TION OF NORA M. KANE IN SUPPORT OF BRIEF IN OPPOSITION TO PLAIN-TIFFS' MOTION FOR SUM-MARY JUDGMENT, # 62 EXHIBIT 62. FOUNDATION-AL DECLARATION OF NORA M. KANE) (KANE, NORA) (ENTERED: 07/12/2013)

119	07/12/2013	NOTICE OF FILING OF DEFENDANTS' EVIDENCE OFFERED AND RECEIVED BY THE TRIBAL COURT DURING SUMMARY JUDGMENT PROCEEDINGS BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER (KANE, NORA) (ENTERED: 07/12/2013)
118	06/24/2013	BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 116 BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (SUMMERLIN, V.) (ENTERED: 06/24/2013)
117	06/24/2013	INDEX IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 116 OF EVIDENCE BY ATTORNEY V. GENE SUMMERLIN, JR ON

BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (ATTACHMENTS: # 1 EXHIBIT, # 2 EXHIBIT, # 3 EXHIBIT, # 4 EXHIBIT, # 5 EXHIBIT, # 6 EXHIBIT, # 7 EXHIBIT, # 8 EXHIBIT, # 9 EXHIBIT, # 10 EXHIBIT, # 11 EXHIBIT, # 12 EXHIBIT, # 13 EXHIBIT, # 14 EXHIBIT, # 15 EXHIBIT, # 16 EXHIBIT, # 17 EXHIBIT, # 18 EXHIBIT, # 19 EXHIBIT, # 20 EXHIBIT, # 21 EXHIBIT, # 22 EXHIBIT, # 23 EXHIBIT, # 24 EXHIBIT, # 25 EXHIBIT, # 26 EXHIBIT, # 27 EXHIBIT, # 28 EXHIBIT, # 29 EXHIBIT, # 30 EXHIBIT, # 31 EXHIBIT, # 32 EXHIBIT, # 33 EXHIBIT, # 34 EXHIBIT, # 35 EXHIBIT, # 36 EXHIBIT, # 37 EXHIBIT, # 38 EXHIBIT, # 39 EXHIBIT, # 40 EXHIBIT, # 41 EXHIBIT, # 42 EXHIBIT, # 43 EXHIBIT, # 44 EXHIBIT) (SUMMERLIN, V.) (ENTERED: 06/24/2013)

116	06/24/2013	MOTION FOR SUMMARY JUDGMENT BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (SUMMERLIN, V.) (ENTERED: 06/24/2013)
115	06/24/2013	INDEX IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 113, BRIEF 114 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (ATTACHMENTS: # 1 EXHIBIT 1 – EXCERPTS OF TRANSCRIPT, # 2 EXHIBIT 2 – 1854 TREATY, # 3 EXHIBIT 3 – 1865 TREATY, # 4 EXHIBIT 4 – FOUNDATIONAL DECLARATION) (KANE, NORA) (ENTERED: 06/24/2013)

114	06/24/2013	BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 113 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER.(KANE, NORA) (ENTERED: 06/24/2013)
113	06/24/2013	MOTION FOR SUMMARY JUDGMENT BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (KANE, NORA) (ENTERED: 06/24/2013)
110	06/19/2013	MEMORANDUM AND ORDER – THIS CASE SHALL BE RESOLVED SOLELY ON THE EVIDENTIARY RECORD ESTABLISHED BEFORE THE TRIBAL COURT WITH THE FOLLOWING ADDITIONS: A. THE JOINT STIPULATION OF THE ORIGINAL PARTIES (FILING NO. 100) SHALL BE CONSIDERED PART OF THE RECORD. B. THE EXHIBITS ATTACHED TO THE STATE

OF NEBRASKA'S COMPLAINT (FILING NO. 107) SHALL BE CONSIDERED PART OF THE RECORD. C. EXHIBIT B (THE OPINION LETTER FROM BERRIGAN TO WILFAHRT DATED SEPTEMBER 5, 2012) TO THE UNITED STATES' INDEX (FILING NO. 106-3) SHALL BE CONSIDERED PART OF THE RECORD. THE DEADLINE FOR THE PLAINTIFFS AND DEFENDANTS TO SUBMIT CROSS-MOTIONS FOR SUMMARY JUDGMENT, EVIDENCE AND SUPPORTING BRIEFS IS MONDAY, JUNE 24, 2013. THE DEADLINE FOR INTERVENERS TO FILE BRIEFS IN SUPPORT OR IN OPPOSITION TO THE PLAINTIFFS OR DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT IS JULY 25, 2013. THE DEADLINE FOR PLAINTIFFS AND DEFENDANTS TO FILE THEIR RESPECTIVE BRIEFS IN OPPOSITION TO THE OPPOSING PARTYS MOTION FOR SUMMARY JUDGMENT AND THAT PARTYS RESPONSE TO THE BRIEFS FILED BY THE INTERVENERS

		IS AUGUST 16, 2013. THE DEADLINE FOR THE INTERVENERS TO FILE THEIR RESPECTIVE BRIEFS IN OPPOSITION TO THE OPPOSING INTERVENING PARTYS BRIEF IS ALSO AUGUST 16, 2013. REPLY BRIEFS SHALL NOT BE FILED ABSENT LEAVE OF COURT. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (GJG,) (ENTERED: 06/19/2013)
109	06/19/2013	DEFENDANT-INTERVENOR UNITED STATES' ANSWER TO AMENDED COMPLAINT 55 (SECOND AMENDED COMPLAINT) BY ATTORNEY DARON CARREIRO ON BEHALF OF INTERESTED PARTY UNITED STATES (CARREIRO, DARON) (ENTERED: 06/19/2013)
108	06/17/2013	ORDER – 1. THE UNITED STATES' UNOPPOSED MOTION TO INTERVENE (FILING 104) IS GRANTED; 2. THE UNITED STATES SHALL FILE ITS ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT, NOW APPEARING AS EXHIBIT A IN SUPPORT OF ITS MOTION TO INTERVENE

(FILING 106-2), WITHIN FIVE (5) CALENDAR DAYS OF THE DATE OF THIS ORDER; 3. UPON THE FILING OF ITS ANSWER, THE UNITED STATES SHALL BE INCLUDED IN THE CASE CAPTION AS DEFENDANT-INTERVENOR; 4. THE JOINT MOTION TO EXTEND TIME TO FILE CROSS MOTIONS FOR SUMMARY JUDGMENT (FILING 101) FILED BY PLAINTIFFS AND DEFENDANTS IS GRANTED, AND SUCH MOTIONS SHALL BE FILED ON OR BEFORE JUNE 24, 2013; 5. THE STATE OF NEBRASKA SHALL CONTACT ALL COUNSEL (INCLUDING COUNSEL FOR THE DEFENDANT-INTERVENOR UNITED STATES) AND MY JUDICIAL ASSISTANT, KRISTIN LEININGER, ON TUESDAY, JUNE 18, 2013, TO SCHEDULE A CONFERENCE CALL BETWEEN THE UNDERSIGNED AND COUNSEL TO DISCUSS A BRIEFING SCHEDULE FOR THE INTERVENING PARTIES. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (JAB) (ENTERED: 06/17/2013)

107	06/17/2013	INTERVENOR COMPLAINT, BY ATTORNEY DAVID D. COOKSON ON BEHALF OF STATE OF NEBRASKA (COOKSON, DAVID) (ENTERED: 06/17/2013)
106	06/14/2013	INDEX IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE 104 BY THE UNITED STATES AS PROPOSED DEFENDANT-INTERVENOR BY ATTORNEY DARON CARREIRO ON BEHALF OF INTERESTED PARTY UNITED STATES. (ATTACHMENTS: # 1 AFFIDAVIT, # 2 EXHIBIT A, # 3 EXHIBIT B, # 4 EXHIBIT C) (CARREIRO, DARON) (ENTERED: 06/14/2013)
105	06/14/2013	BRIEF IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE 104 BY THE UNITED STATES AS PROPOSED DEFENDANT-INTERVENOR BY ATTORNEY DARON CARREIRO ON BEHALF OF INTERESTED PARTY UNITED STATES. (CARREIRO, DARON) (ENTERED: 06/14/2013)
104	06/14/2013	UNOPPOSED MOTION TO INTERVENE BY ATTORNEY DARON CARREIRO ON

		BEHALF OF INTERESTED PARTY UNITED STATES. (ATTACHMENTS: # 1 EXHIBIT) (CARREIRO, DARON) (ENTERED: 06/14/2013)
102	06/13/2013	MEMORANDUM AND ORDER – THE MOTION OF STATE OF NEBRASKA FOR LEAVE TO INTERVENE AS PLAINTIFF (FILING 87) IS GRANTED. THE STATE OF NEBRASKA IS GRANTED LEAVE TO FILE ITS COMPLAINT-IN-INTERVENTION WITHIN FIVE (5) CALENDAR DAYS OF THE DATE OF THIS MEMORANDUM AND ORDER, AND SUCH COMPLAINT SHALL REMAIN IDENTICAL TO THE COMPLAINT-IN-INTERVENTION NOW APPEARING AS AN ATTACHMENT TO THE STATE OF NEBRASKA'S MOTION FOR LEAVE TO INTERVENE AT FILING 87. UPON THE FILING OF THE STATE OF NEBRASKA'S COMPLAINT-IN-INTERVENTION, STATE OF NEBRASKA SHALL BE INCLUDED IN THE CASE CAPTION AS PLAINTIFF-INTERVENOR. THE STATE OF NEBRASKA SHALL

		ARRANGE AND CONDUCT A TELEPHONE CONFERENCE BETWEEN THE UNDERSIGNED AND ALL COUNSEL OF RECORD TO DISCUSS A BRIEFING SCHEDULE. THE STATE OF NEBRASKA SHOULD CONTACT MY LEGAL ASSISTANT, KRIS LEININGER, AT 402-437-1640, TO SCHEDULE THE CALL. AS AN ANSWER TO THE SECOND AMENDED COMPLAINT, A GENERAL DENIAL IS HEREWITH ENTERED ON BEHALF OF THE TRIBE. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (GJG) (ENTERED: 06/13/2013)
100	06/10/2013	JOINT STIPULATION BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, THOMAS J WELSH. (SUMMERLIN, V.) (ENTERED: 06/10/2013)
95	04/22/2013	INDEX IN SUPPORT OF REPLY BRIEF 94 BY ATTORNEY DAVID D. COOKSON ON

		BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA. (ATTACHMENTS: # 1 AFFIDAVIT RYAN S. POST, # 2 EXHIBIT 1, # 3 EXHIBIT 2, # 4 EXHIBIT 3) (COOKSON, DAVID) (ENTERED: 04/22/2013)
94	04/22/2013	REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF 87 BY ATTORNEY DAVID D. COOKSON ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA. (COOKSON, DAVID) (ENTERED: 04/22/2013)
93	04/15/2013	INDEX IN OPPOSITION TO MOTION TO INTERVENE AS PLAINTIFF 87 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER. (ATTACHMENTS: # 1 EXHIBIT 1 – WILFAHRT OPINION 4-24-08, # 2 EXHIBIT 2 – KUNESH MEMORANDUM 4-16-12, # 3 EXHIBIT 3 – AGREEMENT FOR COLLECTION AND DISSEMINATION OF MOTOR FUEL TAXES, # 4 EXHIBIT 4 – 4-22-12 OMAHA

		WORLD-HERALD ARTICLE: "BRUNING: 'I KNOW RIGHT, WRONG'", # 5 EXHIBIT 5 – FOUNDATIONAL DECLARATION OF NORA M. KANE) (KANE, NORA) (ENTERED: 04/15/2013)
92	04/15/2013	BRIEF IN OPPOSITION TO MOTION TO INTERVENE AS PLAINTIFF 87 BY ATTORNEY NORA M. KANE ON BEHALF OF DEFENDANTS ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, BARRY WEBSTER.(KANE, NORA) (ENTERED: 04/15/2013)
89	03/14/2013	INDEX IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF 87, BRIEF 88 BY ATTORNEY DAVID D. COOKSON ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA. (ATTACHMENTS: # 1 AFFIDAVIT OF DAVID LOPEZ, # 2 EXHIBIT 1, # 3 EXHIBIT 2) (COOKSON, DAVID) (ENTERED: 03/14/2013)
88	03/14/2013	BRIEF IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF 87 BY ATTORNEY DAVID D. COOKSON ON

		BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA.(COOKSON, DAVID) (ENTERED: 03/14/2013)
87	03/14/2013	MOTION TO INTERVENE AS PLAINTIFF BY ATTORNEY DAVID D. COOKSON, JON C. BRUNING, KATHERINE J. SPOHN, RYAN S. POST, DAVID A. LOPEZ ON BEHALF OF INTERVENOR PLAINTIFF STATE OF NEBRASKA. (COOKSON, DAVID) (ENTERED: 03/14/2013)
86	03/04/2013	NOTICE REGARDING ORDER, SET/CLEAR FLAGS,,,,,,,,,, 85 NOTICE OF JUDGMENT BY ATTORNEY MARK D. HILL ON BEHALF OF PLAINTIFF VILLAGE OF PENDER (HILL, MARK) (ENTERED: 03/04/2013)
85	02/19/2013	MEMORANDUM AND ORDER – IT IS ORDERED: 1. THE PARTIES SHALL FILE A COPY OF THE FINAL JUDGMENT ISSUED BY THE OMAHA TRIBAL COURT IN THIS MATTER ON OR BEFORE MARCH 15, 2013; 2. THE PARTIES SHALL FILE A STATEMENT OF STIPULATED FACTS ON OR BEFORE

MAY 15, 2013; 3. THE PARTIES SHALL FILE CROSS MOTIONS FOR SUMMARY JUDGMENT AND SUPPORTING BRIEFS AND EVIDENTIARY MATERIALS ON OR BEFORE JUNE 17, 2013; 4. THE PARTIES SHALL FILE RESPONSIVE BRIEFS TO THE CROSS MOTIONS FOR SUMMARY JUDGMENT ON OR BEFORE JULY 12, 2013; 5. THE UNITED STATES DEPARTMENT OF JUSTICE AND THE NEBRASKA ATTORNEY GENERAL ARE INVITED TO FILE AMICUS CURIAE BRIEFS (NOT EVIDENCE) ON OR BEFORE JULY 12, 2013; 6. THE PARTIES MAY FILE REPLY BRIEFS ON OR BEFORE JULY 26, 2013; 7. THE STAY IN THIS MATTER IS LIFTED; 8. THE RESTRAINING ORDER PREVIOUSLY IMPOSED (FILING 16) AND EXTENDED (FILING 24) IS CONTINUED IN FULL FORCE AND EFFECT UNTIL FURTHER ORDER OF THE COURT; 9. THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA SHALL SEND,

		ELECTRONICALLY (IF POSSIBLE) AND BY UNITED STATES MAIL, A COPY OF THIS ORDER TO: (A) THE UNITED STATES DEPARTMENT OF JUSTICE, CARE OF STEVEN MISKINIS, USDOJ-ENVIRONMENT & NATURAL RESOURCES DIVISION, INDIAN RESOURCES SECTION, P.O. BOX 7415, BEN FRANKLIN STATION, WASHINGTON, DC 20044 AND E-MAIL STEVEN.MISKINIS @USDOJ.GOV; AND (B) THE OFFICE OF THE NEBRASKA ATTORNEY GENERAL, 2115 STATE CAPITOL, LINCOLN, NE 68509. ORDERED BY SENIOR JUDGE RICHARD G. KOPF. (TCL) (ENTERED: 02/19/2013)
82	02/14/2013	JOINT MOTION FOR HEARING (STATUS CONFERENCE WITH DISTRICT JUDGE) AND JOINT STATUS REPORT BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS KEITH BREHMER, RON BRINKMAN, RODNEY A HEISE, JAY LAKE, JULIE LAKE, VILLAGE OF PENDER, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA

		SMITH, RICHARD M. SMITH, THOMAS J WELSH. (ATTACHMENTS: # 1 EXHIBIT TRIBAL COURT MEMORANDUM OPINION AND ORDER) (SUMMERLIN, V.) (ENTERED: 02/14/2013)
55	10/04/2007	AMENDED COMPLAINT SECOND AMENDED COMPLAINT AGAINST DEFENDANT MITCH PARKER, BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF DONNA SMITH (SUMMERLIN, V.) (ENTERED: 10/04/2007)
53	10/04/2007	MEMORANDUM AND ORDER REGARDING PENDING MOTIONS. IT IS ORDERED THAT: 1. THE MOTION TO AMEND THE COMPLAINT (FILING 51) IS GRANTED. THE PLAINTIFFS SHALL IMMEDIATELY FILE THE SECOND AMENDED COMPLAINT AS A SEPARATE FILING. 2. THE MOTION TO DISMISS (FILING 33) IS DENIED. 3. THIS CASE IS STAYED TO ALLOW THE PLAINTIFFS TO EXHAUST SUCH REMEDIES AS THEY MAY HAVE IN THE OMAHA TRIBAL COURTS. PLAINTIFFS ARE DIRECTED TO

		PROMPTLY PROCEED TO EXHAUST THEIR REMEDIES AND THE DEFENDANTS ARE ORDERED TO COOPERATE WITH THE PLAINTIFFS IN SEEING TO IT THAT THE PROCESS OF EXHAUSTION IS COMPLETED IN A TIMELY FASHION. COUNSEL FOR THE PLAINTIFFS AND COUNSEL FOR THE DEFENDANTS SHALL FILE JOINT STATUS REPORTS WITH THE CLERK OF COURT ON JANUARY 4, 2008, AND EVERY 120 DAYS THEREAFTER, ADVISING THE COURT OF THE STATUS OF THIS MATTER AND WHETHER THE STAY MAY BE LIFTED.4. THE TEMPORARY RESTRAINING ORDER (FILINGS 16 & 24) REMAINS IN PLACE AND THE DEFENDANTS REMAIN BOUND BY ITS TERMS DURING THE PENDENCY OF THE STAY. STATUS REPORT DUE BY 1/4/2008. ORDERED BY JUDGE RICHARD G. KOPF. (JAB) (ENTERED: 10/04/2007)
52	09/13/2007	BRIEF IN OPPOSITION TO MOTION TO AMEND FIRST AMENDED COMPLAINT AND ADD PARTY 51 BY

		ATTORNEY PATRICIA A. ZIEG ON BEHALF OF DEFENDANTS MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER, ANSLEY GRIFFIN.(ZIEG, PATRICIA) (ENTERED: 09/13/2007)
51	08/31/2007	MOTION TO AMEND FIRST AMENDED COMPLAINT AND ADD PARTY BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (ATTACHMENTS: # 1 EXHIBIT SECOND AMENDED COMPLAINT) (SUMMERLIN, V.) (ENTERED: 08/31/2007)
42	08/03/2007	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS 33 DEFENDANT'S REPLY TO PLAINTIFFS OPPOSITION TO MOTION TO DISMISS BY ATTORNEY LYMAN L. LARSEN ON BEHALF OF DEFENDANTS MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY

		MORRIS, ORVILLE CAYOU, ELEANOR BAXTER, ANSLEY GRIFFIN.(LARSEN, LYMAN) (ENTERED: 08/03/2007)
41	07/20/2007	BRIEF IN OPPOSITION TO MOTION TO DISMISS 33 BY ATTORNEY V. GENE SUMMERLIN, JR ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (SUMMERLIN, V.) (ENTERED: 07/20/2007)
35	06/18/2007	INDEX IN SUPPORT OF MOTION TO DISMISS 33 BY ATTORNEY LYMAN L. LARSEN ON BEHALF OF DEFENDANTS MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER, ANSLEY GRIFFIN. (ATTACHMENTS: # 1 EXHIBIT 1 – AFFIDAVIT OF RODNEY MORRIS (PART ONE) # 2 EXHIBIT 1 – AFFIDAVIT OF RODNEY MORRIS

		(PART TWO)) (LARSEN, LYMAN) (ENTERED: 06/18/2007)
34	06/18/2007	BRIEF IN SUPPORT OF MOTION TO DISMISS 33 BY ATTORNEY LYMAN L. LARSEN ON BEHALF OF DEFENDANTS MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER, ANSLEY GRIFFIN. (LARSEN, LYMAN) (ENTERED: 06/18/2007)
33	06/18/2007	MOTION TO DISMISS BY ATTORNEY LYMAN L. LARSEN ON BEHALF OF DEFENDANTS MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER, ANSLEY GRIFFIN. (LARSEN, LYMAN) (ENTERED: 06/18/2007)
24	05/01/2007	MEMORANDUM AND ORDER. I HELD A STATUS CONFERENCE TELEPHONE CALL WITH COUNSEL IN THE ABOVE-ENTITLED CASE. ALTHOUGH THEY HAVE NOT ENTERED THEIR APPEARANCE YET, BEN THOMPSON AND MAURICE JOHNSON REPRESENTED

		TO ME THAT THEY REPRESENT THE DEFENDANTS. THE PARTIES ADVISED ME THAT THEY WILL BE SENDING ME A STIPULATION AND IN THE INTERIM THEY AGREED THAT THE TEMPORARY RESTRAINING ORDER SHOULD REMAIN IN EFFECT. THEREFORE, IT IS ORDERED THAT THE TEMPORARY RESTRAINING ORDER 16 IS CONTINUED IN FULL FORCE AND EFFECT UNTIL FURTHER ORDER OF THE COURT. TO THE EXTENT THAT THE TEMPORARY RESTRAINING ORDER 16 PREVIOUSLY EXPIRED MERELY BECAUSE OF THE PASSAGE OF TIME, IT IS HEREWITH REIMPOSED. ORDERED BY JUDGE RICHARD G. KOPF. (KLL,) (ENTERED: 05/01/2007)
16	04/17/2007	ORDER. IT IS ORDERED THAT: (1) PURSUANT TO FED. R. CIV. P. 65(B), THE DEFENDANTS, AND EACH OF THEM, TOGETHER WITH THEIR SERVANTS, AGENTS AND EMPLOYEES, IN BOTH THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, ARE HEREWITH RESTRAINED

AND PROHIBITED FROM ENFORCING THE OMAHA TRIBE'S BEVERAGE CONTROL ORDINANCE IN PENDER, NEBRASKA. TO THAT EXTENT, THE PLAINTIFFS' MOTION 5 FOR TEMPORARY RESTRAINING ORDER IS GRANTED. (2) PURSUANT TO FED. R. CIV. P. 65(C) AND (D) NO BOND OR SURETY NEED BE POSTED, BUT PLAINTIFFS, THROUGH THEIR COUNSEL, SHALL PROVIDE NOTICE OF THIS TEMPORARY RESTRAINING ORDER TO ALL AFFECTED PERSONS OR PARTIES. (3) AFTER CONSULTATION WITH DEFENDANTS' COUNSEL, PLAINTIFFS' COUNSEL SHALL CONTACT THE JUDICIAL ASSISTANT FOR THE UNDERSIGNED UNITED STATES DISTRICT JUDGE TO SCHEDULE A TELEPHONE CONFERENCE CALL BETWEEN COUNSEL FOR THE PARTIES AND THE UNDERSIGNED UNITED STATES DISTRICT JUDGE, DURING WHICH THE PARTIES SHALL BE PREPARED TO SCHEDULE A HEARING ON PLAINTIFFS' REQUEST FOR A

		PRELIMINARY INJUNCTION AND TO ADDRESS WHETHER THE HEARING AND TRIAL ON THE MERITS SHALL BE CONSOLIDATED PURSUANT TO FED. R. CIV. P. 65(A)(2). (4) UNLESS EXTENDED BY FURTHER ORDER OF THE COURT, THIS TEMPORARY RESTRAINING ORDER SHALL EXPIRE AT THE END OF TEN (10) DAYS FOLLOWING ITS ENTRY. ORDERED BY JUDGE RICHARD G. KOPF. (KLL,) (ENTERED: 04/17/2007)
15	04/17/2007	EXHIBIT LIST FROM HEARING HELD ON 4/17/2007. (JAR) # 1 COURT EXHIBIT 1). MODIFIED ON 3/17/2015 TO ATTACH COURT EXHIBIT 1 (CS). (ENTERED: 04/17/2007)
14	04/17/2007	TEXT MINUTE ENTRY FOR MOTION PROCEEDINGS HELD BEFORE JUDGE RICHARD G. KOPF IN LINCOLN ON 4/17/2007. MOTION HEARING HELD. APPEARANCES MADE ON THE RECORD. COURT GRANTS PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER 5. WRITTEN ORDER FORTHCOMING. COURT FINDS

		THAT NO BOND IS REQUIRED. COURTROOM DEPUTY: JERI A. REINIG; REPORTER: DIGITAL RECORDER; APPEARANCE FOR PLAINTIFF: GENE SUMMERLIN AND MARNIE JENSEN: APPEARANCE FOR DEFENDANT: NOT REPRESENTED; TIME START: 2:23 P.M. TIME STOP: 2:37 P.M. (JAR) (ENTERED: 04/17/2007)
10	04/17/2007	BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER 5 (SUPPLEMENTAL) BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (JENSEN, MARNIE) (ENTERED: 04/17/2007)
9	04/16/2007	ORDER – ON THE COURT'S OWN MOTION, IT IS ORDERED THAT THE COURT WILL CONDUCT A HEARING ON THE PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

		(FILING 5) AT 2:15 P.M. ON TUESDAY, APRIL 17, 2007, IN COURTROOM NUMBER 1, 5TH FLOOR, UNITED STATES COURTHOUSE, 100 CENTENNIAL MALL NORTH, LINCOLN, NEBRASKA. ORDERED BY JUDGE RICHARD G. KOPF. (CS,) (ENTERED: 04/16/2007)
8	4/12/2007	INDEX – CONTINUED IN OPPOSITION OF MOTION FOR TEMPORARY RESTRAINING ORDER 5 (VOLUME II) BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (ATTACHMENTS: # 1 EXHIBIT 9-11 # 2 EXHIBIT 12-15 # 3 EXHIBIT 16-20) (JENSEN, MARNIE) (ENTERED: 04/12/2007)
7	4/12/2007	INDEX IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER 5 (VOLUME I) BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF PLAINTIFFS

		SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (ATTACHMENTS: # 1 EXHIBIT 1-2 # 2 EXHIBIT 3-8) (JENSEN, MARNIE) (ENTERED: 04/12/2007)
6	04/12/2007	BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER 5 BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (JENSEN, MARNIE) (ENTERED: 04/12/2007)
5	04/12/2007	MOTION FOR TEMPORARY RESTRAINING ORDER BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF PLAINTIFFS SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON

		BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER. (JENSEN, MARNIE) (ENTERED: 04/12/2007)
2	04/11/2007	AMENDED COMPLAINT AGAINST DEFENDANT ALL DEFENDANTS, BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER (ATTACHMENTS: # 1 EXHIBIT 1-2) (JENSEN, MARNIE) (ENTERED: 04/11/2007)
1	04/11/2007	COMPLAINT WITH JURY DEMAND AGAINST ALL DEFENDANTS (FILING FEE $ 350, RECEIPT NUMBER 954072), BY ATTORNEY MARNIE A. JENSEN ON BEHALF OF SUSAN SCHRIEBER, RODNEY A HEISE, THOMAS J WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER (ATTACHMENTS: # 1 EXHIBIT

1-2) (JENSEN, MARNIE)
(ENTERED: 04/11/2007)

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD SMITH, et al., **Appellants,** **and** **STATE OF NEBRASKA,** **Intervenor-Appellant,** **v.** **MITCH PARKER, et al.,** **Appellees,** **and** **THE UNITED STATES,** **Intervenor-Appellee.**	**Case No. 14-1642** **Relevant Document Entries**

10/01/2015	SUPREME COURT ORDER FILED GRANTING CERT PETITION. ORDER FILED ON 10/01/2015 IN CASE NO.14-1406. [4323038] [14-1642] (MER)
05/29/2015	U.S. SUPREME COURT NOTICE OF CERT FILED IN THE SUPREME COURT ON 05/27/2015, CASE NO. 14-14 [4281704] [14:1642] (RLP)
03/05/2015	MANDATE ISSUED. [4251280] [14-1642] (MER)
02/26/2015	JUDGE ORDER: DENYING [4240572-2] PETITION FOR EN BANC REHEARING FILED BY APPELLANTS STATE OF NEBRASKA AND VILLAGE OF

	PENDER. THE PETITION FOR PANEL REHEARING IS ALSO DENIED.; [4240572-3] PUBLISHED ORDER. HRG OCT 2014 [4248369] [14-1642] (MER)
02/02/2015	PETITION FOR EN BANC REHEARING AND ALSO FOR REHEARING BY PANEL FILED BY APPELLANTS STATE OF NEBRASKA AND VILLAGE OF PENDER W/SERVICE 02/02/2015 [4240572] [14-1642] (BEJ)
12/19/2014	JUDGMENT FILED – THE JUDGMENT OF THE ORIGINATING COURT IS AFFIRMED IN ACCORDANCE WITH THE OPINION. JAMES B. LOKEN, C. ARLEN BEAM AND STEVEN M. COLLOTON HRG OCT 2014 [4227766] [14-1642] (LAB)
12/19/2014	OPINION FILED – THE COURT: JAMES B. LOKEN, C. ARLEN BEAM AND STEVEN M. COLLOTON AUTHORING JUDGE:C. ARLEN BEAM (PUBLISHED) [4227762] [14-1642] (LAB)
10/07/2014	ARGUED & SUBMITTED IN ST. PAUL TO JUDGES JAMES B. LOKEN, C. ARLEN BEAM, STEVEN M. COLLOTON ON 10/07/2014 MR. BLAKE E. JOHNSON FOR APPELLANT STATE OF NEBRASKA, MR. GENE SUMMERLIN FOR APPELLANTS RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE,

THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEV BREHMER, RON BRINKMAN AND VILLAGE OF PENDER, MS. KATHERINE J. BARTON FOR APPELLEE THE UNITED STATES AND MR. MARK JON PETERSON FOR APPELLEE MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER AND ANSLEY GRIFFIN. REBUTTAL BY MR. GENE SUMMERLIN FOR RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEVIN BREHMER, RON BRINKMAN AND VILLAGE OF PENDER RECORDED [4204117] [14-1642] (BNS)

08/06/2014 BRIEF FILED – APPELLANT REPLY BRIEF FILED BY STATE OF NEBRASKA. W/SERVICE 08/05/2014, LENGTH: 7 PAGES 10 COPIES OF PAPER BRIEFS FROM STATE OF NEBRASKA DUE 08/11/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS [4183160] [14-1642] (MER)

08/06/2014 BRIEF FILED – APPELLANT REPLY BRIEF FILED BY KEVIN BREHMER, RON BRINKMAN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER,

DONNA SMITH, RICHARD M. SMITH, VILLAGE OF PENDER AND THOMAS J. WELSH. W/SERVICE 08/05/2014, LENGTH: 6,913 WORDS 10 COPIES OF PAPER BRIEFS FROM KEVIN BREHMER, RON BRINKMAN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, VILLAGE OF PENDER AND THOMAS J. WELSH DUE 08/11/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS [4183153] [14-1642] (MER)

07/08/2014 BRIEF FILED – APPELLEE BRIEF FILED BY THE UNITED STATES W/SERVICE 07/07/2014, LENGTH: 13,947 WORDS 10 COPIES OF PAPER BRIEFS FROM THE UNITED STATES DUE 07/14/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS. REPLY BRIEF OF KEVIN BREHMER, RON BRINKMAN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, STATE OF NEBRASKA, VILLAGE OF PENDER AND THOMAS J. WELSH DUE ON 07/22/2014. [4172819] [14-1642] [4172819] [14-1642] – [EDITED 07/11/2014 BY JPP] (JPP)

07/08/2014 BRIEF FILED – APPELLEE BRIEF FILED BY ELEANOR BAXTER,

ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN AND BARRY WEBSTER, W/SERVICE 07/07/2014, LENGTH: 10,209 WORDS 10 COPIES OF PAPER BRIEFS FROM ELEANOR BAXTER, KEVIN BREHMER, RON BRINKMAN, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, RODNEY MORRIS, MITCH PARKER, DOUG SCHRIEBER, SUSAN SCHRIEBER, AMEN SHERIDAN, DONNA SMITH, RICHARD M. SMITH, STATE OF NEBRASKA, THE UNITED STATES, VILLAGE OF PENDER, BARRY WEBSTER AND THOMAS J. WELSH DUE 07/14/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS [4172664] [14-1642] (JPP)

07/08/2014 ADDENDUM OF APPELLEE FILED BY APPELLEE THE UNITED STATES, W/SERVICE 07/07/2014 [4172673] [14-1642] (JPP)

06/19/2014 CLERK ORDER: THE PARTIES TO THIS APPEAL HAVE EXECUTED A STIPULATION SETTING FORTH THE PROVISIONS FOR A STAY OF THE DISTRICT COURT'S FINAL ORDER AND JUDGMENT IN THIS CASE. THE MOTION FOR A STAY OF THE DISTRICT COURT'S FINAL ORDER AND JUDGMENT PENDING RESOLUTION

OF THIS APPEAL IS GRANTED. PURSUANT TO THE PROVISIONS OF THE STIPULATION, THIS STAY SHALL REMAIN IN EFFECT UNTIL THIS COURT ISSUES ITS MANDATE IN THIS MATTER. THE TERMS AND PROVISIONS OF THE STIPULATION AS SET FORTH IN THE MOTION ARE HEREBY INCORPORATED AS PART OF THIS ORDER. [4166452-2] [4167015] [14-1642] (JPP)

06/18/2014 MOTION FOR STAY PENDING APPEAL, FILED BY MR. MARK DAVIS HILL FOR APPELLANTS RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEVIN BREHMER, RON BRINKMAN AND VILLAGE OF PENDER, MS. KATHERINE J SPOHN FOR APPELLANT STATE OF NEBRASKA AND MS. NORA MARIE KANE FOR APPELLEES MITCH PARKER, BARRY WEBSTER, AMEN SHERIDAN, RODNEY MORRIS, ORVILLE CAYOU, ELEANOR BAXTER AND ANSLEY GRIFFIN W/SERVICE 06/18/2014. [4166452] [14-1642] (MDH)

05/06/2014 ADDENDUM OF APPELLANT FILED BY APPELLANT STATE OF NEBRASKA, W/SERVICE 05/05/2014 [4151013] [14-1642] (JPP)

05/06/2014 BRIEF FILED – APPELLANT BRIEF FILED BY KEVIN BREHMER, RON

BRINKMAN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, VILLAGE OF PENDER AND THOMAS J. WELSH. W/SERVICE 05/05/2014, LENGTH: 13,693 WORDS 10 COPIES OF PAPER BRIEFS FROM KEVIN BREHMER, RON BRINKMAN, RODNEY A. HEISE, JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONNA SMITH, RICHARD M. SMITH, VILLAGE OF PENDER AND THOMAS J. WELSH DUE 05/12/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS. BRIEF OF ELEANOR BAXTER, ORVILLE CAYOU, ANSLEY GRIFFIN, RODNEY MORRIS, MITCH PARKER, AMEN SHERIDAN, THE UNITED STATES AND BARRY WEBSTER DUE ON 06/05/2014 [4151281] [14-1642] (JPP)

05/06/2014 BRIEF FILED – APPELLANT BRIEF FILED BY STATE OF NEBRASKA. W/SERVICE 05/05/2014, LENGTH: 14 PAGES 10 COPIES OF PAPER BRIEFS FROM STATE OF NEBRASKA DUE 05/12/2014 WITH REVISED CERTIFICATE OF SERVICE FOR PAPER BRIEFS [4151010] [14-1642] (JPP)

05/06/2014 ADDENDUM OF APPELLANT FILED BY APPELLANTS KEVIN BREHMER, RON BRINKMAN, RODNEY A. HEISE,

	JAY LAKE, JULIE LAKE, DOUG SCHRIEBER, SUSAN SCHRIEBER, DONN/SMITH, RICHARD M. SMITH, VILLAGE OF PENDER AND THOMAS J. WELSH, W/ SERVICE 05/05/2014 [4151285] [14-1642] (JPP)
05/05/2014	RECORD FILED – JOINT APPENDIX, 25 VOLUMES, 6 BOXES, COMMENTS: VOLS. 1 AND 2, (JOINT APPENDIX); VOLS. 3 THROUGH 25 (EXHIBITS TO JOINT APPENDIX), 3 COPIES; 3 COPIES OF CONDENSED INDEX OF JOINT APPENDIX AND EXHIBIT VOLUMES [4151157] [14-1642](JPP)
03/18/2014	CIVIL CASE DOCKETED. [4134614] [14-1642] (PSA)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs, v. MITCH PARKER, In his official capacity as Chairman of the Omaha Tribal Council, BARRY WEBSTER, In his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, In his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, In his official capacity as Secretary of the Omaha Tribal Council, ORVILLE CAYOU, In his official capacity as Member of the Omaha Tribal Council, ELEANOR BAXTER, In her official capacity as Member of the Omaha Tribal Council, and ANSLEY GRIFFIN, In his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control. Defendants.	Case No. 4:07-cv-03101 SECOND AMENDED COMPLAINT (Filed Oct. 4, 2007)

PARTIES

1. Plaintiff Village of Pender, Nebraska ("Pender") is a village as defined in *Neb. Rev. Stat.* § 17-201, a political subdivision within the State of Nebraska, and the County Seat of Thurston County, Nebraska.

2. Plaintiffs[1] Richard M. Smith and Donna Smith are and were at all relevant times residents of Thurston County, Nebraska and the owners of Smitty City West, a convenience store in Pender, Thurston County, Nebraska which sells alcoholic beverages for off-premises consumption.

3. Plaintiffs Jay and Julie Lake are and were at all relevant times residents of Thurston County, Nebraska and the owners of Pender Lanes, a bowling alley in Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises and off-premises consumption.

4. Plaintiffs Doug and Susan Schrieber are and were at all relevant times residents of Thurston County, Nebraska and the owners of Schriebs Bar, a bar in Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises and off-premises consumption.

5. Plaintiff Thomas J. Welsh is and was at all relevant times a resident of Thurston County, Nebraska and the owner of Welsh's Bar, a bar in

---

[1] The Plaintiffs engaged in the sale of alcoholic beverages in the State of Nebraska are collectively referred to as the "Liquor Retailers."

Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises and off-premises consumption.

6. Plaintiff Rodney A. Heise is and was at all relevant times a resident of Thurston County, Nebraska and the owner of the Other Side, a bar in Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises and off-premises consumption.

7. Plaintiff Keith Brehmer is and was at all relevant times a resident of Thurston County, Nebraska and the Commander of American Legion Post 55 and the Pender Veterans Club, a veterans club in Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises consumption.

8. Plaintiff Ron Brinkman is and was at all relevant times a resident of Thurston County, Nebraska and the President of the Board for the Twin Creeks Golf Club, a golf club in Pender, Thurston County, Nebraska which sells alcoholic beverages for on-premises consumption.

9. Defendant Mitch Parker is Chairman of the Omaha Tribal Council and serves as administrative head of the Tribe.

10. Defendant Barry Webster is Vice-Chairman of the Omaha Tribal Council.

11. Defendant Amen Sheridan is Treasurer of the Omaha Tribal Council.

12. Defendant Rodney Morris is Secretary of the Omaha Tribal Council.

13. Defendant Orville Cayou is a Member of the Omaha Tribal Council.

14. Defendant Eleanor Baxter is a Member of the Omaha Tribal Council.

15. Defendant Ansley Griffin is a Member of the Omaha Tribal Council and the Omaha Tribe's Director of Liquor Control. As Director of Liquor Control, Griffin must review liquor licenses and applications and make reports to the Tribal council.

16. Defendants are all sued in their official capacities and Plaintiffs seek only prospective injunctive and declaratory relief.

JURISDICTION AND VENUE

17. Plaintiffs bring this action under federal common law and also seek relief authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq.

18. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

INTRODUCTION

20. The Liquor Retailers' businesses are all located within the Village of Pender, Thurston County, Nebraska.

21. Pender is a village of approximately 1,300 residents in northeastern Nebraska and is governed by a Village Board of Trustees.

22. Pender, and the Liquor Retailers' businesses, are not located on any federally recognized Indian Reservation and are likewise not located in "Indian Country."

23. The Liquor Retailers neither purchase nor sell liquor received within the boundaries of the Omaha Reservation.

24. Despite their off-reservation location, Defendants are attempting to enforce the Omaha Tribe's liquor license and tax scheme on the Liquor Retailers' businesses located within the boundaries of Pender.

25. Plaintiffs have not applied for a liquor license from the Omaha Tribe, nor have Plaintiffs paid any liquor taxes to the Omaha Tribe.

26. The Defendants threaten the Liquor Retailers with fines of $10,000 and Tribal Court enforcement proceedings unless the Liquor Retailers submit to the Tribe's liquor license and tax scheme.

27 Plaintiffs object to Defendants' attempt to regulate affairs of non-Indians on non-reservation lands in excess of their tribal authority under federal common law.

28. Pender further objects to Defendants' attempt to exercise governing and legislative authority over residents and businesses located within the boundaries of Pender.

29. Plaintiffs bring this action to obtain declaratory and injunctive relief because the Defendants' attempts to enforce the liquor regulations against Plaintiffs exceed Tribal authority.

FACTUAL ALLEGATIONS

The Liquor License and Tax Scheme

30. On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code, known as the Alcoholic Beverage Control Title ("ABCT"). (The ABCT is attached hereto as Ex. 1.)

31. The purpose of the ABCT "is to govern the sale, possession and distribution of alcohol ***within the Omaha Tribe's Indian Reservation***." (*Id.*, emphasis added.)

32. The ABCT requires the Omaha Tribe to appoint a Director of Liquor Control who "shall review liquor licenses, applications for liquor licenses and shall report to the Council on such matters." (*Id.*)

33. The ABCT licenses cost $500, $1,000, or $1,500, depending upon the class of license. (*Id.*, § 8-2-2.)

34. The ABCT also requires a ten percent sales tax on liquor sold by "any retail licensee licensed under the provisions of this Title." (*Id.*, § 8-3-1.)

35. Defendants have threatened $10,000 fines and Tribal Court enforcement proceedings against the Liquor Retailers if they fail to pay for a Tribal liquor license by January 1, 2007. (Exs. 1-2.)

36. The Liquor Retailers have not applied nor paid for a liquor license from the Omaha Tribe.

37. The Liquor Retailers have not paid any sales tax to the Omaha Tribe pursuant to the ABCT.

The Location and Nature of the Liquor Retailers

38. The Liquor Retailers are all located within the boundaries of Pender, Thurston County, Nebraska.

39. The Liquor Retailers are not located on a federally recognized Indian reservation and do not sell liquor on any federally recognized Indian reservations as defined by the federal government.

40. The Liquor Retailers do not purchase their supply of liquor within the boundaries of any federally recognized Indian reservation.

41. None of the Liquor Retailers have intentionally conducted business with the Omaha Tribe or its members.

42. None of the Liquor Retailers have entered into contracts, or conducted formal business relations, with the Omaha Tribe.

43. None of the Plaintiffs are members of the Omaha Tribe.

Pender's Location

44. Pender is a town of approximately 1300 citizens located in Thurston County, in Northeast Nebraska.

45. Pender is situated on land which lies west of the Sioux City and Nebraska railroad right of way, as that term is defined in the 1882 Act of Congress (the "1882 Act").

46. The 1882 Act authorized the sale of part of the Omaha Indian Reservation west of the railroad right of way to homesteaders, including the lands which comprise the Village of Pender and on which the Liquor Retailers are currently located.

47. In the 1882 Act, the lands west of the railroad right of way were not held in trust for the Omaha Tribe but were instead opened up to non-Indian settlement.

48. The 1882 Act established a process whereby homesteaders obtained the land west of the railroad right of way directly from the United States government, with the proceeds credited to the Omaha Tribe. The land west of the railroad right of way was sold to and settled by non-Indians.

49. In the event that any homesteader defaulted on a payment, the land did not revert back to the Omaha Tribe, but was sold at public auction.

50. As a result of the 1882 Act, Pender is not part of any federally recognized Indian reservation.

51. Likewise, Pender is not part of "Indian country" because it is not a dependent Indian community, has not been set aside by the federal government for use by Indians as Indian land, and is not under federal superintendence.

52. The Omaha Tribe does not offer any tribal government services to its members in Pender nor

does the Omaha Tribe exercise civil jurisdiction in Pender.

53. Pender is policed not by the Omaha Tribe, but by the Nebraska State Patrol and the Thurston County Sheriff.

54. Pender is governed by a Village Board of Trustees who exercise civil and legislative jurisdiction over the citizens and businesses located within Pender's boundaries. The Omaha Tribe's attempt to assert civil and legislative jurisdiction over the citizens and businesses located within Pender's boundaries are in violation of the justifiable expectation of Pender and its residents that Pender is not a part of the Omaha Indian Reservation.

55. Currently, there is virtually no allotment land and no Indian trust land west of the railroad right of way, as defined in the 1882 Act.

56. The Bureau of Indian Affairs, the United States Department of the Interior, the Thurston County District Court, and the Nebraska Attorney General have all determined that Pender is not part of the Omaha Indian Reservation due to its location west of the railroad right of way.

57. However, Defendants have treated Pender, and the Plaintiffs, as part of the Omaha Indian Reservation. (*See* Exs. 1-2.)

FIRST CLAIM FOR RELIEF
(Violation of 18 U.S.C. § 1161)

58. The allegations of paragraphs 1 through 54 are realleged by this reference.

59. 18 U.S.C. § 1161 permits the Omaha Tribe to regulate liquor sales on its reservation lands and in "Indian country."

60. Because Pender, and therefore the Liquor Retailers, are not located on reservation lands or in Indian country, Defendants have exceeded any authority granted to them under 18 U.S.C. § 1161.

SECOND CLAIM FOR RELIEF
(Exceeding Tribal authority under Federal Common Law)

61. The allegations of paragraphs 1 through 54 are realleged by this reference.

62. Pender, and the Liquor Retailers, are not located within the boundaries of the Omaha Indian Reservation.

63. Defendants' attempt to enforce the ABCT on Plaintiffs is an act in excess of Tribal authority and thus a violation of federal common law as set forth by the Supreme Court.

WHEREFORE, the Plaintiffs request that this Court (1) enter judgment declaring that Pender is not within the boundaries of the Omaha Indian Reservation and that Defendants may not lawfully enforce the ABCT in Pender in the future; (2) issue permanent injunctions prohibiting Defendants, their employees and agents, and all persons acting under their direction, from enforcing the ABCT in Pender;

and (3) any other such relief as this Court deems appropriate.

RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs.

BY: OGBORN SUMMERLIN & OGBORN, P.C.
V. GENE SUMMERLIN – 19611
TED LANE – 23426
610 J Street, Suite 200
Lincoln, NE 68508
(402) 434-8040
gene@osolaw.com
ted@osolaw.com

BY: /s/ Gene Summerlin
V. Gene Summerlin – 19611

OMAHA TRIBAL COURT) IN TRIBAL COURT
) OMAHA NATION IN
MACY, NEBRASKA) NEBRASKA & IOWA

****

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER and RON BRINKMAN Plaintiffs,

v.

RODNEY MORRIS, In his Official Capacity as Chairman of the Omaha Tribal Council, DORAN MORRIS JR., In his Official Capacity as Vice-Chairman of the Omaha Tribal Council, TILLIE ALDRICH, In her Official Capacity as Treasurer of the Omaha Tribal Council, GWEN PORTER, In her Official Capacity as Secretary of the Omaha Tribal Council, JEFFREY S. MILLER, In his Official Capacity as Member of the Omaha Tribal Council, MITCHELL PARKER, In his Official Capacity as Member of the Omaha Tribal Council, FORREST ALDRICH JR., In his Official Capacity as Member of the Omaha Tribal Council,

Defendants.

CV. No.08-2

MEMORANDUM OPINION AND ORDER

(Entered Feb. 4, 2013)

(Filed Feb. 14, 2013)

****

STATEMENT OF THE CASE

This case presents the question whether, in an 1882 statute that ratified an agreement for the sale of Omaha tribal lands, Congress intended to diminish the boundaries of the Omaha Reservation in Nebraska. Non-Indian bar owners in Pender, Nebraska, which is in the portion of the Omaha Reservation subject to the 1882 Act, contest the Omaha Tribe's imposition of an alcohol regulations and tax upon them alleging that the land sale constituted a diminishment of the Reservation. If Congress intended to diminish the Omaha Reservation by enacting the 1882 statute, the area involved would no longer constitute "Indian country" as defined by 18 U.S.C. 1151[a] and would deny the Omaha Tribe the right to seek regulation and taxation of alcohol sales in Pender. If Congress did not intend the diminishment of the Omaha Reservation, then the issue of regulation and taxation of non Indian fee owners of bars on the Reservation would conform to rules governing such actions within recognized reservation boundaries.

The early history of the United States is a story of forced migration of the native people in advance of white settlement of the west. By the early 1700's, the Omaha Tribe arrived on land along the Missouri River in present day Nebraska. *Plaintiff's Exh. 10 @ 4-5.* The Tribe's primary camp was at the confluence of Omaha Creek and the Missouri River where the Tribe engaged in hunting and agrarian pursuits,

actively trading with merchants along the Missouri River. *Defendant's Exh 4 @4-5.*

By the early 1800's, the Omaha Tribe was beset by epidemics of disease, including smallpox, as well as attacks from the west by neighboring tribes resulting in a loss of approximately half of the Tribe's population . *Id* In hopes of securing some peace, the Omaha Tribe entered into "peace and friendship" treaties with the United States in 1815 and again in 1825. *Plaintiff's Exh. 10 @ 5.* However, these treaties did not provide the Omahas with promised protection against the Sioux and other area tribes. *Defendant Exh. 4 @ 9-10, en 15.* Subsequent treaties involving the Omaha Tribe resulted in further loss of the Tribal land base and, more importantly, of hunting rights to lands in Iowa. *Id.@ 8-9, en 14.* By the 1840's, the Omaha people were nearly destitute from the cumulative effects of federal Indian policy and treaty making. *Id.*

Overall, the federal policy toward the Indian nations changed in the 1840's in order to support the wave of European immigration to North America of individuals and families seeking to farm the vast expanse of western lands. *Plaintiff's Exh. 10 @ 5, n 8.* More emphasis was placed on Indian land cessions and concurrent Indian settlement on defined reservations. *Id. @ 5-6.*

In this context, in 1854, the Omaha Tribe entered into an agreement with commissioners representing the United States government for the sale of Tribal

lands in exchange for monetary payments. *Defendant's Exh. 4 @10-11, en 17*; *Defendant's Exh. 5*; *10 Stat. 1043.* The Treaty with the Omaha, 1854 called for the Omaha Tribe to cede its claim and relinquish its occupancy of all lands west of the Missouri River and south of a line due west of the entrance of the Iowa River into the Missouri. *Defendant's Exh. 5.* In exchange, the Tribe was to receive cash payments, goods, and services totaling $890,000.00 over a period of 50 years. *Id.*

The actual boundaries of the Omaha Reservation, encompassing approximately 300,000 acres, were not settled until later, following a selection by the Omaha Tribe of land including the Blackbird Hills which were closely associated with the Tribe since its entry into the territory of Nebraska. *Defendant's Exh. 4 @14, en 25.* The 1854 Treaty also introduced the prospect of assignment, or allotment, of individual parcels of land to Tribal members as part of the agreement. *Plaintiff's Exh. 10 @7, n 20.* However, no allotments appear to have been made pursuant to the 1854 Treaty. *Id. @ 8.*

In the 1860's, the Omaha Tribe took pity on destitute members of the Winnebago (Ho Chunk) Tribe who sought to resettle on the Omaha Reservation from their reservation in Dakota territory. *Defendant's Exh. 4 @ 16, en 30.* In 1865, the Omaha Tribe agreed to sell approximately 97,500 acres, constituting the northern part of its Reservation, to provide for a reservation for the Winnebagos. *Defendant's Exh. 4 @ 17, en 32*; *14 Stat. 667.* The agreement provided

that the Omaha Tribe would sell the northern part of their reservation to the United States government for fifty thousand dollars together with extensions of prior obligations that the government promised to the Tribe. *Defendant's Exh. 6.*

The 1865 Treaty contained provisions relating to assignment of land to individual Tribal members which differed from the allotment provisions contained in the 1854 Treaty. *Plaintiff's Exh. 10 @ 9-10.* The 1865 allotments were smaller in size from the 1854 Treaty allotments, causing consternation among the Omaha people, many of whom saw individual ownership of land as a hedge against the forced removal to Indian Territory *Defendant's Exh. 4 @17-18, en 34.* A land survey was conducted prior to the allotments.. *Plaintiff's Exh. 10 @8, n 23.*

After several years, which included disputes over the substance and process, allotments were completed and individual members of the Omaha Tribe were issued "certificates" of allotment to parcels of land. *Defendant's Exh. 4 @20-21.* The allotments were made in the eastern section of the Omaha Reservation, where Tribal members had formed communities near the Missouri River. *Plaintiff's Exh. 10 @ 9 n 29; Defendant's Exh. 4 @21, en 41.*

The allotments did not provide a panacea for the problems plaguing the Omaha people due to the reality that successful farming required the input of capital to buy seed, buildings and equipment. *Defendant's Exh. 4 @ 21-22, en 42.* The Tribe continued

to seek resources to secure their claim to their reservation land. In 1871, Chiefs of the Omaha Tribe appealed to Congress to allow the sale of up to 50,000 acres of land from the western portion of their Reservation to obtain additional funds to support farming activities. *Plaintiff's Exh. 10 @9.* In 1872, Congress passed legislation allowing the sale of land on the Omaha Reservation, together with land sales on other reservations, with the lands to be appraised and sold in 160 acre parcels or as a whole. *Id.*; *17 Stat. 391.* The land was put on sale in 1873, but due to the high appraised value and lack of interest of buyers, only 300 acres were actually sold. *Plaintiff's Exh.10 @ 10, n 36*; *Defendant's Exh. 4 @ 23.*

Following the failure of the 1872 land sale, some Omahas met with chiefs of the Ponca Tribe and offered to sell some of the individual allotments. *Defendants' Exh. 4 @ 24, en* 47. The proposed sale was disallowed by federal officials. *Id., en 49.* In 1874, Congress approved a sale of approximately 12,350 more acres in the northeastern portion of the Omaha Reservation to the Winnebago Tribe to expand the Winnebago Reservation. *Defendant's Exh. 4 @ 23-24 Plaintiffs' Exh. 10 @ 11, n 43;18 Stat.146.* The proceeds of the sale, eighty-two thousand dollars, was to be applied by the Secretary of Interior for the use of the Omaha Tribe. *18 Stat. 146 @ 170.*

In 1877 the United States government ordered the removal of the Ponca Tribe from their reservation in northern Nebraska to Indian Territory citing the need for protection of the Tribe from neighboring

Sioux Indians. *Plaintiff's Exh. 10 @ 12*; *Defendant's Exh. 4 @ 25, en 50.* This action raised fears among the Omahas that the removal of the Poncas foreshadowed their own possible removal from the Omaha Reservation. *Id.* This fear was compounded when, in 1879, the Bureau of Indian Affairs ordered the Omaha and Winnebago Agencies to be combined and placed on the Winnebago Reservation.. *Defendant's Exh. 4 @ 25-26, en 53.*

In 1880, the Sioux City and Nebraska Railroad Company obtained agreements from the Omaha and Winnebago Tribes for a right-of-way through the respective reservations from northwest to southeast for construction of track and stations for cash payment. *Plaintiff's Exh. 10 @ 11*; *Defendant's Exh. 4 @ 28 en 62.* The Omahas continued to seek avenues to gain funds and resources. By this time the Tribe had split into a progressive minority and a traditional, conservative majority, who differed in their respective approaches to the looming influx of white settlers. *Defendant's Exh. 4 @26-27, en 56,58.* The progressives saw allotment and farming as a hedge against the potential of forced removal portended by the Ponca experience and favored selling lands to achieve the goal of . *Id.* The traditionalists favored retaining communal lands. *Id., en 59.*

After it was disclosed that the "certificates" of allotment which had previously been assigned to Tribal members were not fee title to the lands, the progressives, led by Alice Fletcher, an ethnologist who arrived on the Omaha Reservation to study the

Omaha people, pressed to petition Congress to grant the allottees clear title *Plaintiff's Exh. 10 @ 12-13*; *Defendant's Exh. 4 @29-30, en 64-66.* The petition led to legislation proposed by Senator Alvin Saunders of Nebraska in 1882, which was reported out as Senate bill 1255 (hereafter "S. 1255"). *Id.*

S. 1255 was debated over several months. The Senate approved the bill, which only dealt with the sale of the land in the western section of the Reservation on April 22, 1882. *Plaintiff's Exh. 10 @ 13.* S. 1255 was referred to the House of Representatives where it was debated in that chamber with a focus on the allotment of land on the Omaha Reservation. *Id.* The House amended S. 1255 and the bill was referred to a conference committee. *Id.* On August 3, 1882, the bill with amendments was approved by both houses of Congress and on August 7, 1882 it was signed into law by President Chester A. Arthur . *Id. @ 14*; *Defendant's Exh. 4 @ 44, en 107*

Section 1 of the 1882 Act (22 Stat. 341) provides:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the

Interior, July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

Section 2 of the Act provides in part:

That after the survey and appraisements of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act . . .

Section 3 of the Act provides:

That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including

such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

Section 5 of the Act provides in part:

That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, . . .

Section 8 of the Act provides in part:

> That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance [sic] whatsoever . . . Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

The Act resulted in the appraisal of the lands opened for settlement listing the acreage available at 50,157. *Plaintiff's Exh. 10 @18 n. 85.* According to the Report of the Commissioner of Indian Affairs for 1884, the number of acres allotted to individual members of the Omaha Tribe was 78,609.68, 876.60 of which were listed as being "west of the railroad." *Id.* Approximately 55,000 acres were patented to the Omaha Tribe for future allotments. *Id.*

The land open for settlement was sold quickly but payments were not always timely. *Plaintiff's Exh. 10 @19, 22*; *Defendant's Exh. 4 @ 52-54.* In 1884, the town-site of Pender was platted. *Plaintiff's Exh. 10 @ 22 n. 107.* Thurston County was organized in 1889. *Plaintiff's Exh. 10 @ 22.*

Following the sale of the opened lands, the non-Indian population of the land west of the railroad right-of-way surged to approximately 99% in recent census data. *Plaintiff's Exh. 10 @ 28.* Members of the Omaha Tribe continued to reside on allotments following the initial sale and individual Omahas participated in the community affairs of Pender shortly after the opening of the reservation. *Defendant's Exh. 4 @ 64-65.* The subsequent treatment of the opened area involved in the 1882 Act by the federal government, the State of Nebraska, and the Omaha Tribe is extensive and the interpretation to be accorded to the various actions is actively debated by the parties.

In 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code governing the sale, possession and distribution of alcohol within the Omaha Reservation. *Plaintiff's Special Appearance and Complaint for Declarative and Injunctive Relief.* The Tribe's Alcoholic Beverage Control Title required liquor licensees in the Village of Pender to comply with the ordinance and to pay license fees to the Tribe. *Id.* The Alcoholic Beverage Control Title also imposed a ten percent tax on liquor sales. *Id.*

In response, Village of Pender and a number of sellers of alcoholic beverages in Pender filed suit in the United States District Court for the District of Nebraska on April 17, 2007. *Id.* Following the issuance of a temporary restraining order on the implementation of the Alcoholic Beverage Control Title, the District Court stayed the litigation and directed the Plaintiffs to exhaust remedies available in the Omaha Tribal Court.

Plaintiffs filed their action on January 7, 2008 in the Omaha Tribal Court. Following extensive discovery, covering over four years, both parties filed motions for summary judgment on their claims relating to the effect of the 1882 Act on the boundaries of the Omaha Reservation. After briefing by the parties, a hearing was conducted on September 10, 2012 for oral arguments. The parties do not contest individual facts as raising genuine issues but agree that the material facts in this case are settled historically and only the legal interpretation of the facts is open to contest. Therefore, the issue before the Court is whether, by enacting the 1882 land sale Act for the portion of the Omaha Reservation west of the right-of-way of the Sioux City and Nebraska Railroad Company, the Forty-Seventh Congress intended to diminish the Omaha Indian Reservation by the sale of land to white settlers.

OPINION

During the last half of the nineteenth century, the United States government engaged in a program to settle Indian tribes on reservations with the goal of opening up vast expanses of land for white settlement while encouraging tribal members to abandon communal lifestyle for individual property ownership and farming the land. *Solem v. Bartlett, 522 U.S. 329, 466 (1984).* In order to accomplish these goals, Congress authorized commissions to enter into treaties with the various tribes and to negotiate the settlement of tribal members through allotment of parcels of land to individuals and the sale of the remaining lands to non-Indian settlers. *Id. @ 467*

The effect on the reservation boundaries of the allotment of land to individual tribal members and the sale of the "surplus" lands to white settlers has been the subject for a series of United States Supreme Court cases. *Seymour v. Superintendant of Washington State Pennitentiary, 368 U.S. 351 (1962)*; *Mattz v. Arnett, 412 U.S. 481 (1973)*; *DeCoteau v. District County Court for the Tenth Judicial Circuit, 420 U.S. 425 (1975)*; *Rosebud Sioux Tribe v Kneip, 430 U.S. 584 (1977)*; *Solem v. Bartlett, 465 U.S. 463 U.S. 1984*); *Hagen v. Utah, 510 U.S. 399 (19940*; *South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).* "[I]t is settled law that some surplus land acts diminished reservations . . . and other surplus land acts did not . . . *Hagen, 510 U.S. @ 410 quoting Solem, 465 U.S. @ 469* (*citations omitted*). "Once a block of land is set aside for an Indian reservation and no

matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem, 465 U.S. @ 470.*

In order to determine the effect of any surplus land act, the Supreme Court has developed a "fairly clean analytical structure" *Id. @ 411.* Congress has plenary authority over Indian affairs, including the right to alter terms of a treaty with Indian tribes, and only Congress can diminish an Indian reservation. *Yankton, 522 U.S. @ 34 citing United States v. Celestine, 215 U.S. 278,285 (1909).* "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. The most probative evidence of the intent of Congress is the statutory language employed by the Congress in opening Indian lands for non-Indian settlement. *Hagen, 510 U.S. @ 411.*

In reviewing the language of the statute, the Court imposes canons of construction to the analysis. First, the language of the statute must "clearly evince" the intent of Congress to change the boundaries of a reservation. Solem, 465 U.S. @ 470. Next, ambiguities of language in the statute must be construed broadly in favor of the Indians due to the vast inequities in the bargaining power of the government over the tribes and of the trust responsibility of the United States over the tribes. *Decoteau, 420 U.S. @ 447*; *Hagen, 510 U.S. @ 422 (Blackman, J. dissenting).* Third, operative terms of absolute "cession" and the inclusion of a fixed "sum certain" in the granting

clause of an act, creates a "nearly conclusive" or "almost insurmountable" presumption of diminishment of a reservation through sale of tribal lands. *Yankton, 522 U.S. @ 792, citing Solem, 465 U.S. @470.* Similarly, language in an act which "restores" or: "vacates" the land sold to the "public domain" evidences a Congressional intent to terminate the reservation status of land sold to non-Indians. *Hagen, 510 U.S. @ 414, citing Seymour, 368 U.S. @ 354-55.I*

The second prong of the Supreme Court analysis involves the examination of the "events surrounding" the passage of an allotment-era land act for clear-cut evidence of a "widely-held contemporaneous understanding" that Congress intended the reservation boundaries to be altered. *Solem, 465 U.S. @471.* The contemporary historical context of the passage of the act includes the legislative history of the act, reports on the negotiations of the land sale, executive and presidential declarations, reports of executive agencies overseeing Indian matter, and congressional enactments surrounding the passage of the act in question. *Id.*; *Rosebud, 430 U.S. @ 602*; *Seymour, 368 U.S. @355-5.* In the absence of a "clear expression" in the statutory language relating to the intent of Congress, only "unequivocal" evidence contained in the surrounding circumstances will allow a finding of diminishment of a reservation. *Yankton, 522 U.S. @351.*

The third, and least compelling, prong of the Supreme Court analysis, involves the examination of the subsequent jurisdictional and demographic history of the region opened for settlement under the

applicable act. *Solem, 465 U.S. @472.* This analysis can serve to provide an "additional clue"as to what was foreseen by Congress in enacting legislation opening a reservation for white settlement. *Id.* However, subsequent history and demographics provides an "unorthodox and potentially unreliable method of statutory interpretation." *Id.* Demographic and subsequent history must act in concert with "substantial and compelling" evidence of the intent of Congress to diminish a reservation, contained in both he language of the act and its legislative history in order to be given effect. *Id.*

This Court first considers the language of the 1882 Act as it relates to the intent of Congress in opening the Omaha Reservation for sale and settlement. Section 1 of the 1882 Act (22 Stat. 341) provides in pertinent part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty . . .

Section 3 of the 1882 Omaha land Act provides:

> That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

The United States Supreme Court has been clear that the inclusion of certain language in a land sale statute raises a "nearly conclusive" or an "almost insurmountable" presumption of a Congressional intent to diminish the boundaries of an Indian reservation based upon the decision in *DeCoteau, 420 U.S. 425 (1975).. Yankton, 522 U.S. @ 344, citing Solem, 465 U.S. @ 470; Hagen, 510 @ 411.*

In *DeCoteau*, the Court examined Article 1 of the 1891 land sale act which stated:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby **cede, sell, relinquish, and convey** to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have

been made. *DeCoteau, 420 U.S. @ 456* (*emphasis added*).

Furthermore, Article 2 of the 1891 Act provided:

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the **sum of two dollars and fifty cents per acre for each and every acre thereof . .**
>
> ."*Id.* (*emphasis added*).

The Court has found that the terms such as "cede," "sell," and "relinquish," and "convey" when combined with the intent to pay a "sum certain" for the land create an "unconditional commitment from Congress to compensate the Indian tribe" for its opened land. *Yankton, 522 U.S. @ 344.* Language of cession and sum certain were contained in the agreements which led the Supreme Court to findings of disestablishment or diminishment of the Lake Traverse Indian Reservation in South Dakota, certain lands in four South Dakota counties originally on the Rosebud Reservation, and the unallotted portions of the Yankton Sioux Reservation in South Dakota. *DeCoteau, 420 U.S. @445-48* ("*cede, sell, relinquish, and convey . . . all their claim right, title, and interest" in all the unallotted land for two dollars and fifty cents per acre*); *Rosebud, 430 U.S. @ 593-7* ("*cede, surrender, grant, and convey . . all their claim, right, title, and interest" in unallotted land for no less than*

two dollars and fifty cents per acre, proceeds to be "paid to the Indians."); *Yankton, 522 U.S. @ 344* (*"cede, sell, relinquish, and covey . . . all their claim, right, title, and interest in and to all unallotted lands" for six hundred thousand dollars*).

The Supreme Court has also found that operative language in an act providing that the opened land be "restored" or "vacated" to the "public domain" indicated the intent to diminish a reservation. *Hagen, 510 U.S. @ 413-14*; *Rosebud, 430 U.S. @ 589.* In *Hagen*, the Court held that "the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status." *Id @ 414.* The Court discussed language of restoration to the public domain as evidence of congressional intent in contrasting cases in which diminishment was not found (*Seymour, Mattz*) with those in which diminishment was found (*Rosebud*). *Id.*

The operative language of the 1882 Act authorized the Secretary of Interior to "cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty . . . " *Section 1, 1882 Act.* The proceeds of the sale, after payment of fees "shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually

expended for the benefit of said Indians, under the direction of the Secretary of the Interior." *Article 3, 1882 Act.*

Language indicating that the United States intended to act as an agent for the tribe in surveying and auctioning land with proceeds held in trust for the members of the tribe, such as that in the 1882 Act, has been used to support findings of the lack of congressional intent to diminish reservations. In *Seymour*, the Supreme Court contrasted language in an 1892 statute vacating the northern half of the Colville Reservation in Washington State to the public domain with a 1906 act in which proceeds from sale of opened land was to be "deposited in the Treasury of the United States to the credit" of the members of the Tribe in the southern half of the reservation. *Id. @355-6.* The Court found that the 1906 Act did "no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.*

In *Mattz*, the Court found that an 1892 Act affirming the Proclamation of President Benjamin Harrison opening the Klamath River Reservation in California for settlement did not terminate the Reservation. *Id. @ 504.* The Court stated that, after repeated attempts by members of Congress to terminate the Klamath Reservation, language of a conference bill in 1892 permitted allotments on the land and provided that proceeds from the sale of

unallotted land be held in trust for the "maintenance and education" of the Indians, rather than for their removal. *Id.* The Court stated that Congress knew how to express an unequivocal intent to terminate or diminish a reservation by citing language in acts passed between 1871 and 1892. *Id.* In light of this, lack of clear termination language militates against a casual inference of termination. *Id.*

In *Solem*, the Supreme Court determined that language of the Act of May 29, 1908, directing the Secretary of the Interior to "sell and dispose" of all of certain described land on the Cheyenne River and Standing Rock Sioux Indian Reservations in North Dakota and South Dakota together with language that the proceeds from the sale were to be "deposited in the Treasury of the United States, to the credit of the Indians" did not evidence an intent to diminish. *Id. @ 472-4.* Such language simply inferred an intent by Congress that the United States was "simply being authorized to act as the Tribe's sales agent." *Id. @ 473.* The Court rejected other language in the 1908 Act referring to opened lands remaining part of the public domain and the use of the phrase "reservations thus diminished" as not containing sufficient clarity and relevance to overcome the clear expression of congressional intent to preserve the reservations contained in the remainder of the Act. *Id. @ 475-6.*

Plaintiffs' concede that the 1882 Act lacks the determinative language of diminishment applied by the Supreme Court. *Brief in Support of Plaintiffs' Motion for Summary Judgment @35; Plaintiffs' Brief*

in Opposition to Defendants' Motion for Summary Judgment @ 2. Rather, Plaintiffs discuss the language of the 1872 Act as providing the requisite Congressional intent to diminish the boundaries of the Omaha Reservation. In several cases, the Supreme Court has examined language of previously, or subsequently enacted legislation to clarify the intent of the surplus land act in question.

In *Rosebud*, the Court found that a 1901 amendment to the 1889 Treaty clearly indicated an intention to remove certain counties in South Dakota from the Rosebud Sioux Reservation. *430 U.S. @ 587.* The Court cited the unilateral power of Congress to abrogate treaties with Indian Tribes pursuant to *Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)* to negate the requirement of tribal consent for acts passed in 1904, 1907 and 1910 opening lands on the Rosebud Reservation for sale to white settlers. *Id.* The Court also found that the language of the acts "was identical with or derivative from" the language of the proposed 1901 amendment, which had been ratified by the Tribe, with only the terms for method of payment altered. *Id. @ 588.*

In *Hagen*, the Court determined that 1903, 1904 and 1905 Acts simply extended the time for the opening of the Uintah Reservation in Utah while providing a few other details extending the intent of the 1902 Act allotting land to the Ute Indians and providing for the sale of all of the unallotted lands. *510 U.S. @ 412-15.* The 1902 Act provided for restoration of the unallotted lands to the "public domain"

which the Court held as nearly determinative in finding an intent to diminish the Uintah Reservation. *Id.* The Court cited the specific references to the 1902 Act in the subsequent legislation as indicating that the earlier act was the "basic legislation" and that failure to repeat exact language of the 1902 Act restoring land to the public domain could be inferred. *Id. @ 415-16.*

In *DeCoteau*, the Supreme Court examined "sum certain" and "cession" language in the 1891 Act opening the Lake Traverse Reservation in South Dakota for settlement with numerous other acts ratified by Congress at the same time. *420 U.S. @ 439 nn. 21, 22.* In each of the acts the language determined the outcome of the opening of the respective reservations.

Finally, in *Seymour*, the Supreme Court contrasted language in the 1906 Act providing for the sale and settlement of lands on the northern portion of the Colville Reservation in Washington State with the language of the 1892 Act which vacated the southern part of the reservation to the public domain. *368 U.S. @ 355.* The Court based its determination that the northern half of the reservation remained Indian country was partially controlled by the method of payment, i.e. depositing proceeds from the sale in the United States Treasury for the credit of the Indians. *Id. @ 356.* The Supreme Court found that this form of payment indicated the intent of Congress to preserve "federal responsibility for and jurisdiction over" the tribal rights on the Colville Reservation. *Id. @ 356.*

In relation to earlier Omaha Acts, the language of the 1882 Act differs substantially from language of cession and sum certain contained in the 1854 Treaty and 1865 Winnebago land sale which are discussed more fully below. *See Plaintiffs Exh. 5*; *Treaty of March 6, 1865, 14 Stat. 667, Plaintiffs' Exh. 10, n 22.* Missing from the 1882 Act is language requiring the Omaha people to vacate and remove themselves from the land proposed to be sold. *Id.*

The language employed in the 1882 Act also differs from the language employed in the 1872 Act. The 1872 Act calls for the sale of lands in the western portion of the Omaha Reservation to be "separated from the remaining portion of the reservation." *Section One, 1872 Act.* In addition, the 1872 Act provided that all patents for lands sold under the respective acts were to have a clause "forever prohibiting the sale of intoxicating liquors on such lands . . . " *Section 5, 1872 Act.* In *Yankton*, the Supreme Court stated that a reasonable inference could be made from the inclusion of a similar liquor prohibition in lands sold would be meaningless in light of the general prohibition of liquor in Indian country if the land was to remain within the reservation. *522 U.S. @ 350.* Each of these provisions, which have supported a finding of diminishment, differ from the 1882 Act which contains neither a reference to the separation of the land sold from the remaining reservation nor a prohibition of alcohol on the lands sold.

The 1882 Act does not incorporate the 1872 Act by reference nor does it specifically cite to the earlier

act. The1872 Act may more appropriately provide evidence of the "surrounding circumstances" and "legislative history" of the 1882 Act rather than controlling the interpretation of the language of the 1882 Act, itself. The language of the 1872 Act does contain substantial ambiguity and is not entirely supportive of a finding for diminishment. By providing for the deposition of the funds from the sale of land in the U.S. Treasury for the benefit of the Omaha Indians, the language of the 1872 Act is similar to the 1882 Act in that both support a finding of preservation of the Omaha Reservation boundaries following the guidance of the Supreme Court.

The sale of land comprised only a portion of the 1882 Act. Section 5 of the Act provides for the allotment of land and states in part:

> That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under

> eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, . . .

Section 5 of the Act is clarified by Section 8 which provides in relevant part:

> . . . Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

Defendants contend that the provision allowing for allotments west of the described railroad right of way clearly indicates the intention of Congress to preserve the reservation intact following the sale of the unallotted lands. Since there was no limitation, most, if not all, of the allotments under the 1882 Act could have been selected in the western portion of the Omaha Reservation. However, if tribal members had selected a large number of allotments in the opened area, it would been in opposition to the intention of the Tribe and Congress seeking to use the proceeds of the sales to provide resources for agricultural development on the Reservation. And, in fact, this did not occur.

It does appear that only tribal lands could be allotted to Indians circa 1882. When discussing the

effect of the Dawes Act of 1887, 25 U.S.C. section 331, the Supreme Court has been clear that the allotment policy was enacted to provide tracts of "reservation lands" to individual Indians. *Yankton, 522 U.S. @ 333*; *DeCoteau, 420 U.S. @ 432.* In addition, in *Solem*, the Supreme Court stated that the inclusion of Section 2 of the Cheyenne River Act, providing for continued permission to obtain allotments in the "affected portion of the reservation before the land was officially opened to non-Indian settlers" supported an interpretation that the opened area was to remain part of the Cheyenne River Indian Reservation. *Solem, 465 U.S. @ 474.* However, the fact that allotments have been made in an opened area does not negate a finding of diminishment/termination of reservation status. *See e.g., DeCoteau, 420 U.S. 425 (1975)*; *Hagen, 510 U.S. 399 (1994)*; *Yankton, 522 U.S. 329 (1998).*

Considering all of the circumstances, the inclusion of the language clarifying that tribal members could choose allotments on the western portion of the Omaha Reservation prior to the sale of land does suggest that Congress intended a continued tribal presence in the opened area. This language, however, does not resolve the issue definitively.

Following a full examination of the language of the 1882 Act, this Court does not find language of "cede, sell, relinquish" nor language providing for a "sum certain" nor language restoring the land sold to the "public domain," and therefore the 1882 Act does not raise a presumption of diminishment of the

Omaha Reservation following the sale and allotment of reservation lands. Nor does the Act require Tribal members to vacate the area but rather allows for selections of allotments in the area of the proposed sales. Furthermore, the inclusion of language providing that the United States was to act as the sales agent of the Omaha Tribe in selling the "surplus" lands while depositing the proceeds in the Treasury for the benefit of the Omaha Indians, conforms with the cases finding a preservation of reservation boundaries following allotment and land sales. i.e. *Seymour v. Superintendant, 368 U.S. 351, (1962)*; *Maltz v. Arnett, 412 U.S. 481 (1973)*; *Solem v. Bartlett, 465 U.S. 463 (1984).*

Based upon an examination of the language of the 1882 Act, the Court finds a lack of support for the intent of Congress to diminish the boundaries of the Omaha Reservation. As a corollary, the intent of Congress to preserve the boundaries of the Omaha Reservation following the sale of surplus land to settlers is evident through the language applied in the statute.

Under the Supreme Court's analysis, this finding does not dispose of this issue. The Supreme Court has stated that the lack of specific language of "cession" and "sum certain" does not automatically raise a presumption of preservation of reservation status. *Hagen, 510 U.S. @ 411.* Thus, a further examination of the circumstances surrounding the passage of the 1882 Act and the Act's legislative history as well as an examination of the subsequent history of the area

must be undertaken to determine if there is unequivocal evidence of a intent by the Forty-Seventh Congress of the United States to diminish the Omaha Reservation in spite of the language of the statute.

This Court next re-examines the acts and treaties which led up to the 1882 Act to illuminate the facts and circumstances surrounding the passage of the 1882 Act. The Omaha people had maintained settlements in what was to become eastern Nebraska by the Missouri River since the seventeenth century. *Defendants' Exh. 4 @ 3;en 1*; *Plaintiffs' Exh 10@ 4, n 7b.* By the mid-nineteenth century, the Omahas had been forced by disease and attacks by Dakota Sioux intruders to seek protection from the nascent government of the United States through a series of agreements. *Defendants' Exh. 4 @ 5, en 5.* The Omaha Tribe ceded its claim to lands in Iowa in the Prairie du Chien Treaty of 1830 for annuity payments. *Id. @ 7-8.*

By the mid-1840's the annuities had run out and the situation for the Omaha people had become extremely dire. *Id. @9.* By the 1850's the United States government entered into a policy of acquiring tribal lands in the central great plains for settlement by non-Indians and of removing the tribes to more compact reservations. *Plaintiffs' Exh. 10 @ 4*; *Defendants' Exh 4 @ 10.* In 1854, the Omaha Tribe entered into a treaty with the federal government in which the Tribe agreed to "cede" and to "relinquish" tribal lands in Nebraska west of the Missouri River and south of a line demarking the Omaha Reservation for agreed

annual payments. *Plaintiffs Exh. 5.* The treaty required the Omahas to "vacate the ceded country" and to "remove to the lands reserved" for them in the agreement. *Id.*

The treaty also restated the federal promise of protection for the Omahas and further provided authority for the President to assign tracts of land to individual Omaha Indians, a precursor of the later allotment policy of the United States. *Id.* Apparently, no assignments were made under the 1854 Treaty. *Plaintiffs' Exh. 10 @ 8.* The 1854 Treaty, containing language found by the Supreme Court to support a diminishment of Tribal lands, undeniably effected a cession of Omaha Tribal lands and established the Omaha Reservation. The Omahas eventually settled on boundaries of their reservation, comprising approximately 300,000 acres, which included the Blackbird Hills, a traditional home for the Omaha people. *Defendants' Exh. 4 @ 14-15*; *Plaintiffs' Exh. 10 @ 6.*

Having a reservation was not a panacea for the Omaha people. In spite of the repeated promises by the government to provide protection for the Omaha people, attacks by Dakota intruders continued, limiting access by Omaha hunters to lands in the western section of the reservation. *Defendants Exh. 4 @ 15.* By 1863, destitute members of the Winnebago or Ho-Chunk Tribe, began to settle in the northern parts of the Omaha Reservation. *Defendants' Exh. 4 @ 16.* The Omahas, who took pity on the Winnebago people and who also sought a buffer against further incursions by the more hostile Sioux Indians, agreed to sell land

in the northern part of their reservation for a homeland for the impoverished Winnebagoes. *Id.*

In March of 1865, leaders of the Omaha Tribe signed a treaty agreeing to "cede, sell, and convey" to the United States approximately 97, 500 acres of the northern portion of the Omaha Reservation for fifty thousand dollars to be applied for "goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements" on the reservation. *Treaty of March 6, 1865, 14 Stat. 667, Plaintiffs' Exh. 10, n 22.* Significantly, the 1865 Act required the Omaha Indians to "vacate and give possession of the lands ceded by this treaty immediately upon ratification." *Article 1, Treaty of March 6*, 1865.

As part of the agreement, a new allotment process was implemented replacing the failed assignments of the 1854 Act. *Defendants' Exh. 4 @ 17-18, en 32*; *Plaintiffs' Exh. 10 @ 8.* The terms of allotment were less favorable in the 1865 treaty but were accepted by the Omahas, partly because of their fear of losing their land and being forced to remove to Indian Territory. *Defendants' Exh. 4 @18-19.* The fear of removal was partially due to legislative action in the Nebraska territorial legislature seeking the abolition of the Omaha Reservation in anticipation of statehood for Nebraska. *Id. @ 20.* Again, as in the 1854 Treaty, Congress utilized language of cession with a sum certain to clearly indicate the intent to diminish the Omaha Reservation following the sale of

land for the Winnebago Reservation in the 1865 Treaty and Act.

The allotments under the 1865 Act were completed by 1871. *Plaintiffs' Exh. 10 @ 8.* However, the conditions leading to the insecurity of the Omaha people regarding their ability to avoid removal had not been allayed by the allotments or by the meager annuities. *Defendants' Exh. 4 @ 20-21.* The allotments had been in the eastern portion of the Reservation, the traditional site for villages, while the Omaha Tribe continued to hunt, with diminishing success, on the western lands of the Reservation. *Plaintiffs' Exh. 10 @ 9*; *Defendants' Exh. 4 @ 2, en 41.* In August 1871, a request was made on behalf of the Omaha people for Congress to authorize the sale of 50,000 acres of land in the western portion of the Omaha Reservation to settlers for capital to fund homes and farms. *Plaintiffs' Exh. 10 @ 9.*

Action on the request was delayed until 1872 when Congress authorized the Secretary of the Interior "to cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south." *Act of June 10, 1872, 17 Stat. 391* [*Plaintiffs' Exh. 10 @ 9, n. 32.*] A minimum price of two dollars and fifty cents per acre was set and the proceeds of the sale were to be placed in the United States Treasury to the credit of the Indians. *Id.* The sale was advertised but little

interest was generated, apparently by the high minimum price. *Plaintiffs' Exh. 10 @10-11*; *Defendants' Exh. 4 @ 2, en 45.*

As previously discussed, the language utilized in the failed 1872 Act is ambiguous as to the intent of Congress when authorizing the sale of lands on the Omaha Reservation. In contrast, the 1854 Treaty and 1865 Act clearly evince the intent of Congress to diminish the Omaha Reservation. During the period in question, "Congress was fully aware of the means by which termination (of reservation status) could be effected." *Mattz, 412 U.S. @ 504.* As a whole, the facts and circumstances surrounding the enactments leading up to the 1882 Act do not reveal an unequivocal statement of a Congressional purpose to diminish the Omaha Reservation.

Another fundamental line of inquiry into the circumstances surrounding the passage of the 1882 consists of an examination of the legislative history of the 1882 Act. The legislative history of the 1882 Act comprises entries in the Congressional Record for the 47th Congress and the United States Senate as well as various reports to the respective houses of Congress. *See, e.g. Plaintiffs' Exh. 10, nn. 47-50, 58-64.*

The debates in Congress and the Senate concerning the sale of land on the Omaha Reservation began in the 46th Congress with discussions of reviving the land sale proposal of 1872 to allow the sale of the roughly "49,461.71" acres left unsold by the 1872 Act. *Plaintiffs' Exh. 10, n. 48.* Concerns were raised about

selling the land in a single block, fearing that this would encourage a single speculator to purchase the land for a reduced rate which would run counter to the government's policy of settling many "white" farmers among the Indians to encourage the Indians' adoption of an agrarian lifestyle. *Id.* Apparently, no action was taken on this proposal. *Plaintiffs' Exh. 10 @12.*

Another bill, designated S.1255, was reported to the Senate on February 20, 1882. *Plaintiffs' Exh. 10 @ 13.* During the discussions of the bill, Senators expressed serious concerns about the status of land within the western area either selected for allotments by members of the Omaha Tribe or purchased outright by Indians in relation to taxation by the State of Nebraska. *Defendants' Exh. 4 @32*; *Plaintiffs' Exh. 10, n. 58.* Other issues raised by Senators included whether the Omahas were getting a fair price for the land and whether the amount of land proposed for sale would leave an adequate amount of land for proper agricultural purposes. *Plaintiffs' Exh. 10, n. 58.* S. 1255 was passed with amendments and referred to the House of Representatives. *Id.*

In the House of Representatives, the Committee for Indian Affairs added allotment provisions. *Plaintiffs's Exh. 10 @ 13.* Debate in the House focused on whether Omahas would be allowed to select their allotments before the land sales and whether allotments could be chosen in all parts of the Reservation. *Id., n 60.* Representatives also questioned whether the selection of the western land was an attempt to

swindle the Indians out of their most valuable land. *Id.* After amendments were offered to require allotments prior to the sale and to designate that allotments could be selected "either east or west of said right of way," the bill finally was passed by the House. *Id.*; *Defendants's Exh. 4 @41-43.* The bill was sent back to the Senate, and after conference, was approved and sent to President Chester A. Arthur for his signature. *Plaintiffs' Exh. 10@ 14.*

In spite of intense discussion of many aspects of the bill, neither side can point to a definitive statement regarding the effect of the land sale on the boundaries of the Omaha Reservation. Plaintiffs point to references in the Congressional Record to the amount of land left for the Tribe after the sale as about 100,000 acres. Defendants call attention to the discussions leading to the amendment allowing selections of allotments anywhere on the Reservation. "[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose" to diminish an Indian reservation. *Solem, 465 U.S. @ 478.* Similarly, the statements contained in the legislative history of the 1882 Act do not clear up the uncertainty about the key issue of diminishment.

This Court could find no reference in its review of the legislative history to specific boundaries of the Omaha Reservation in any of the debates and discussions. One key reason for this omission may be apparent in the statement of Representative Dudley

Haskell of Kansas, who defined the federal policy in effect at the time. Haskell stated that "[b]efore any land is sold they are at liberty to make their individual selections of one hundred and sixty acres to every head of a family, eighty acres to every widow, and forty to every child. These severalty selections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to issued in fee simple . . . " *Plaintiffs' Exh. 10 @ 13, n. 60.*

Federal Indian policy at the end of the nineteenth century envisioned opening Indian reservations to white settlement with the goal of having the Indians "enter traditional American society" by turning them into farmers within a generation. *Solem, 465 U.S. @ 468.* Therefore, Congress failed to be "meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.* References to smaller acreage left after a sale of land could as likely allude to the "reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers" as it could to the "reduction that a complete cession of tribal interests in the opened area would precipitate." *Id.*

Another aspect of the surrounding circumstances related to the opening of a reservation for white settlement is contemporaneous understanding of the Indians involved in the sale. *DeCoteau, 420 U.S. @ 434-435*; *Yankton, 522 U.S. @353.* In the Report to Congress dated July 1, 1882, Representative Haskell

included summaries of statements by a number of Omaha Tribal members advocating passage of the 1882 Act. *Plaintiffs' Exh. 10, n. 59.* The overwhelming sentiment of the "memorials" of Omaha ancestors was a desire to gain title or permanency to the lands on which they resided and a fear of removal from their homeland. *Id.* Absent are statements, by and to the Indians, which in other cases decided by the Supreme Court, have indicated that all parties understood that the sale of land would involve a dissolution of reservation boundaries. *See e.g., DeCoteau 420 U.S. @432 "We never thought to keep this reservation for our lifetime;" Yankton, 522 U.S. @ 352 "This reservation alone proclaims the old time and old conditions;" Hagen, 510 U.S. @417 "[c]ongress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation . . . "(emphasis in original).*

The contemporaneous understanding and legislative history of the 1882 Act contain examples which are interpreted by each party as supporting its assertions as to the intent of Congress in authorizing the sale of land on the Omaha Reservation. In cases where the Supreme Court has found Congressional intent to diminish/disestablish reservations based upon language in the respective Acts, it also found unequivocal support in the surrounding circumstances and contemporaneous history. *See, e.g. DeCoteau, 420 U.S. @ 455; Hagen, 510 U.S. @ 420; Yankton, 522 U.S. @ 354.* In contrast, in the cases where the

Supreme Court did not find diminishment in language, it also found lack of support in the contemporaneous history. *Solem, 465 U.S. @478*; *Mattz, 412 U.S. @ 503.*

Some Congressmen and Senators speak as if they believe that the 1882 Act would change the status of the land offered for sale while others clearly speak as if they are convinced that the Tribal character of the land will remain following the land sales. Tribal members speaking about the land sales are primarily concerned with obtaining good title for their allotments and reserving their land base in Nebraska from forced removal as was the fate of the Poncas. As previously stated, "(i)t is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish" a reservation. *Solem, 465 U.S. @ 478.*

In this case, this Court does not find clear and unambiguous evidence of the intent to diminish the Omaha Reservation which is inconsistent with the implications of non-diminishment found in the language of the 1882 Act. Therefore, the Court must look further to see if there is convincing evidence in the subsequent history of the area to overcome the lack of clear diminishment language in the 1882 Act and the failure of unequivocal evidence in the surrounding circumstances of its passage.

The United States Supreme Court utilizes a third prong of the inquiry into the effect of surplus land acts over the boundaries of Indian Reservations, that

being an investigation of the subsequent jurisdictional and demographic history of the area opened for settlement. *Solem, 465 U.S. @ 471.* The history involved in this case consists of nearly 130 years and this inquiry is fraught with peril due to the mass of data involved and the potential unreliability of the interpretation. *Id.*

Plaintiffs raise, and rely on, several lines of evidence relating to the subsequent history of the land opened for settlement under the 1882 Act. After the opening of the Omaha Reservation in 1884, settlers poured into the area seeking to take advantage of the good land. *Plaintiffs' Exh. 10 @ 22, n 105.* By September of that year claims for nearly 43,000 acres had been filed. *Id.* The town of Pender was established by 1890 and grew to approximately 700 in population by the mid 1890's. *Plaintiffs' Exh. 10 @ 22.*

Plaintiffs point to census data compiled by Emily Greenwald which show that the non-Indian population of areas west of the railroad right of way has consistently been over 99% between 1900 and 2000. *Plaintiffs' Exh. 4 @ 27-28.* In contrast, the non-Indian population of the area east of the right of way has ranged from 30.22% in 2000 to a high of 85.20% in 1920. *Id.* In *Hagen*, the Supreme Court stated that demographic evidence showing that an area is "predominantly populated by non-Indians with only a few pockets of Indian allotments" could burden the administration of State and local governments if the land is considered Indian Country. *Hagen, 510 U.S. @420 quoting, Solem, 465 U.S. @ 471-472, n. 12.*

The parties disagree as to the number and impact of Omaha allotments and the Tribal presence in the opened area west of the railroad right of way. Plaintiffs state that only 10 allotments totaling approximately 876 acres west of the right of way. *Plaintiffs' Exh. 10 @ 17-18.* Furthermore, Plaintiffs claim that the opened area was settled almost exclusively by non-Indians. *Plaintiffs' Brief in Support of Motions for Summary Judgment @ 42.*

Defendants place the number of allotments to Omaha Tribal members at 15 in the opened area, even after substantial pressure by Commissioner of Indian Affairs, Hiram Price, to discourage the practice.. *Defendants' Exh. 4 @ 61-64.* Furthermore, Defendants cite a number of Omaha tribal members who played important roles in the early settlement of the Village of Pender. *Defendants' Exh. 60 @ 18-20.*

Plaintiffs cite a number of references to the size of the Omaha Reservation in a series of Annual Reports of the Commissioner of Indian Affairs following the land sale as evidence that the Omaha Reservation had been diminished by the Act of 1882. *Plaintiffs' Exh. 10 @24-26, nn 118-123-Reports for 1874, 1876, 1884, 1888, 1898.* The reports show that the listed acreage of the reservation was approximately 143,000 acres and seek to account for this by subtracting the 50,000 acres opened for settlement from the 192,867 acres cited in the 1873 Annual Report. *Plaintiffs' Exh. 10 @ 24, n 118.*

Defendants claim that the statistics utilized by the Office of Indian Affairs are not clearly defined and contain substantial errors and inconsistencies. *Defendants' Exh. 4 @56-57.* Defendants point out that the figures prior to the 1882 land sales list the size of the Omaha Reservation as approximately 143,000 acres, which could not be accurate in that only a few hundred acres were sold under the largely failed 1872 Act. *Id.*

The subsequent treatment of the opened area as evidenced by "Congress, courts and the Executive" have provided additional evidence into the impact of the land sale. *Solem, 465 U.S. @ 469-70.* Plaintiffs cite to a series of acts of Congress extending the time for payment under the 1882 Act. *Plaintiffs Exh. 10 @ 19, citing acts in 1885, 1886, 1888, 1890, and 1894.* Particularly, Plaintiffs claim that the 1888 Act presents compelling evidence of the change of status of the area west of the right of way. The Act states:

> The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act upon which the purchaser shall be in default, under existing law, for sixty days after the passage of this act, in payment of any part of the purchase-money, or in the payment of any interest on such purchase-money for the period of two years previous to the expiration of said sixty days. The Secretary of the Interior shall thereupon without delay cause all such land, together with all tracts of land embraced in said act not heretofore sold, to be sold by public auction, after

> due notice, to the highest bidder over and above the original appraisal thereof, upon the terms of payment authorized in said act. And the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians, in such manner as shall be hereafter determined by law.

Plaintiffs' Exh. 10 @ 19-20, n 92.

Plaintiffs cite cases *Drummond v. United States, 34 F.2d 755 (8th Cir. 1929)* and *Hooks v. Canadian Holding Co., 272 P. 366 (Okla. 1928)* for support of its contention that following default in a sales contract, Indian land automatically reverts to the tribe rather than allowing resale. *Plaintiffs' Brief in Support of Motion for Summary Judgment @ 36-37.*

Defendants claim that Plaintiffs' reliance on the 1888 is misplaced in that, if the 1882 Act diminished the Omaha Reservation, there would be no basis for reversion of the land to the Tribe upon default in payment by a non-Indian purchaser. *Defendants' Reply Brief in Support of Motion for Summary Judgment @ 3.* Defendants further claim that the 1894 Act extending the time for payment contained a provision stating that "this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained," thereby signifying a retained interest in the land west of the right of way twelve years after the passage of the 1882 Act. *Defendants' Exh. 4 @ 54.*

Both parties cite to semantic distinctions in the vast series of references to the Omaha Reservation during the years following the 1882 land sale to support their conclusions as to the impact of the land sale. Plaintiffs point to statements such as that of United States Indian Agent George Wilkinson in 1885 who said that "[t]he Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers . . . " *Plaintiffs' Exh. 10 @ 19, n. 88.* Defendant cite numerous examples of references in executive reports and in the congressional acts extending the period for payment of land being sold "on" or "in" the Omaha Reservation as support for its contentions. *Defendants' Exh. 4 @ 54-55.*

The parties have a major disagreement over the opinions of the Field Solicitor's Office of the United States Department of Interior specifically addressing the issue of the boundaries of the Omaha Reservation. On June 27, 1989, Marcia Kimball, Office of Solicitor, United States Department of Interior, issued a letter opinion to Jerry Jaeger, Area Director, Bureau of Indian Affairs stating that her conclusion that the "most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned railroad right of way . . " under a theory of de facto diminishment. *Plaintiffs' Exh. 10 @ 3, n. 5.*

Subsequently, as Defendants point out, Patrice Kunesh, Deputy Solicitor for Indian Affairs, issued a letter to Priscilla Wilfahrt, Twin Cities Solicitor,

stating that the June 27, 1989 Kimball letter was incorrect, concluding that the western boundary of the Omaha Reservation had not been altered by the 1882 Act and that the Kimball opinion was withdrawn and not "to be relied upon or used by your office." . *Defendants' Exh. 4 @ 81, en 225, 226.* The April 16, 2012 Kunesh Memo refers to Wilfahrt's April 24, 2008 opinion reaching the opposite conclusion from Kimball's regarding the western boundary of the Omaha Reservation. *Id.*

Defendants and the United States, as Amicus, motioned the Court to accept a formal opinion of the Department of Interior dated September 5, 2012 affirming the 2008 conclusion of the Solicitor. Plaintiffs objected to the new evidence on the basis of the record having been settled at the time of the request. This Court agreed, finding that the evidence was merely a restatement of the prior opinion of the Department of Interior rejecting the 1989 opinion. Defendants and Amicus then asked that this Court take judicial notice of the September 5 letter opinion and the Court again declines the invitation, finding that inclusion of additional evidence after the close of the arguments is prejudicial to the Plaintiffs.

Plaintiffs submit evidence based upon the depositions of the members of the Omaha Tribal Council at the time relating to Tribal activities in the opened area. According to the deposition answers, Tribal authorities have not enforced sections of the Omaha Tribal Code relating to fire protection, animal control, fireworks, wildlife and parks, business permits and

licenses, child protective services, education on a regular basis west of the railroad right of way. The Tribe does not have administrative or governmental offices nor does the Tribe conduct regular ceremonies west of the right of way. *Id.*

Defendants claim the Omaha Tribe has attempted to provide law enforcement services in the opened area but were met with hostility and resistance from the state and local officials and residents of Pender and the surrounding area. *Defendants' Exh. 50.* Defendants also cite to Federal Environmental Protection Agency actions involving agricultural actions against firms located west of the railroad right of way, claiming that the sole basis for federal, rather than state, involvement would be recognition of the Reservation status of the land in question. *Defendants' Exh. 51.*

P.L. 280 is likely another factor affecting the apparent lack of tribal administration on the Omaha Reservation. In 1953 the United States Congress passed 67 Stat. 588, codified as 18 U.S.C. section 1360 and 18 U.S.C. section 1162, and more commonly known as P.L. 280, providing that Nebraska, together with four other states, should have both civil and criminal jurisdiction over all the Indian country within the states to the same extent as the states exercised jurisdiction in the rest of the state. *Omaha Tribe of Nebraska v Village of Walthill, 344 F. Supp.823, 825-826(D. Neb. 1971).* P.L. 280 was part of a change of policy by the federal government from seeking to empower tribal governments to one of the eventual

termination of tribal governance. *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering, 476 U.S. 877, 895 (1986).*

The federal policy of termination was reversed during the civil rights era of the 1960's allowing for retrocession of state jurisdiction back to the federal government and tribes. *Walthill, 344 F. Supp. @ 826.* The Omaha Tribe and Nebraska eventually agreed on a partial retrocession of criminal jurisdiction on the Omaha Reservation, leaving out jurisdiction over crimes on public highways. *Id. @ 827* In spite of the eventual retrocession of criminal jurisdiction, Thurston County law enforcement agencies and county courts continued to arrest and try Indians on criminal charges. *Id. @ 828.* Therefore, there is evidence that the allocation of jurisdiction over the area west of the right of way was impacted by the general loss of jurisdiction over the entire reservation occasioned by P.L. 280 and the subsequent disagreements over retrocession.

Plaintiffs present a case decision by the District Court for Thurston County in *State v. Picotte*, in which an Indian was accused of a crime in Pender, Nebraska. *Brief in Support of Plaintiffs' Motion for Summary Judgment @ 38-39.* The state court determined that the western portion of Thurston County was no longer within the Omaha Reservation. *Id.* Plaintiffs also submit an opinion of Nebraska Attorney General Jon Bruning in 2007 opining that the Omaha Reservation had been diminished. *Defendants' Exh. 4 @ 77, en. 213.*

Both sides present additional evidence, including maps, to support their contentions in relation to subsequent treatment of the area. However, as the Supreme Court has stated, evidence of subsequent jurisdictional and demographic patterns is "less illuminating" and is the "least compelling" in terms of authority when reaching a decision regarding alteration of the boundaries of the Omaha Reservation. *Hagen, 510 U.S. @ 420*; *Yankton, 522 U.S. @ 356.* An examination of the factual matters presented here reveals the problems with this type of evidence.

"Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet . . . not every surplus land Act diminished the affected reservation." *Yankton, 522 U.S. @ 356.* On review, the demographic changes on the Omaha Reservation may not reflect the same circumstances as that of other reservations subject to the Supreme Court's boundary analysis. Prior to the land sale, few if any Omaha Indians made the western portion of the Reservation a home but rather used the land as a buffer and security zone as well as a hunting ground. *Defendants' Exh. 4 @ 15, en 26.* There were few, if any, non-Indians in the area. *Plaintiffs' Exh. 10 @ 12, n 51* (*citing one persons offer to buy the entire 50,000 acres in 1881*). Therefore, the demographic pattern was not one of Indians being displaced by non-Indian settlers but of non-Indians inhabiting an area previously used by the Omahas primarily for hunting and security.

Additionally, Indian allotments passed quickly out of Indian hands following the enactment of the federal allotment policy. *Defendants' Exh. 60 @ 3-8.* By 1916, ninety percent of the fee patents issued to allotees of the Omaha Tribe, mostly on the eastern portion of the Reservation, had been sold or mortgaged to the point of risk of loss. *Id. @ 7, n 16.* According to the census data provided by Plaintiffs' expert, in 1920 over 85% of the population east of the right of way, an area not disputed as part of the Omaha Reservation, was non-Indian. *Plaintiffs' Exh. 10 @ 27-28.* Applying a notion of "de facto" or "de jure" diminishment to demographic patterns such as those presented in this case could lead to a perverse application of a doctrine similar to adverse possession. This could result in not only the loss of tribal control over disputed areas but over any area where the population ratios reached a critical mass.

The treatment of the opened area by executive agencies and Congress "is so rife with contradictions and inconsistencies as to be of no help to either side." *Solem, 465 U.S. @ 478.* The same applies here. Reports of the size of the Omaha Reservation appear to be inconsistent and do not specify the parameters for the stated acreage, whether referring to Indian controlled lands or to actual reservation totals. The dispute over the changing opinions of the Department of the Interior, which have led to diametrically opposite conclusions as discussed above, dramatically point to the hazard of using subsequent jurisdictional history to divine the intent of a former Congress.

Similarly, reliance on isolated statements in the long historical record or on differences in map descriptions of an area, commonly lack authority and usually do not yield clarity in a search for Congressional intent. The same can be said of a state court case in which the Omaha Tribe was not involved or the opinion of a state Attorney General who admits that the ultimate decision for the opinion stated is a matter of federal law. *Defendants' Exh. 4 @ 77, en. 213.* In each of these matters, there is no evidence that the full record was examined as has been done by the parties to this action, and there is significant peril in relying on any of the assertions made.

The cases cited by Plaintiffs for support of their contention that defaulted land has to revert to tribal ownership do not conform with a reading of the cases. In *Drummond*, the issue was whether land sold by an Indian allotee to non-Indians would contain original restrictions on alienation if returned to the allotee by virtue of default of the mortgage. *34 F. 2d @ 755-759.* In *Hooks*, the issue involved a specific act of Congress requiring the reversion of defaulted land to the tribe for resale by the federal government. *272 P. @ 366-367.* Neither case supports the proposition put forward by Plaintiffs nor requires a finding of diminishment based upon their holdings.

The key issue in this case is the western boundary of the Omaha Reservation and whether it changed following the passage of the 1882 Act. If the intent of Congress in 1882 was to alter the western boundary of the Omaha Reservation to a geographically defined

line, such as the right of way for the Sioux City and Omaha Railroad, this fact should appear in the vast array of evidence produced by the research of the parties. The Court has examined references physical description of the boundaries of the Omaha Reservation, starting with the initial survey completed in 1855, to find evidence supporting the arguments of either side. The report of the 1855 survey listed the boundaries of the Omaha Reservation as follows:

> The South-east corner is known as the mouth of Woods Creek or the point where said creek empties in the Missouri River, thence running due west six miles two hundred ninety eight (298) rods to the south branch of Blackbird Creek, said creek is 15 feet wide and has a cotton wood sight tree on the east bank of 16 inches diameter, thence west six miles 160 rods to Middle Creek, said creek is 25 feet wide, and runs to the south then west 16 miles 202 rods to the South-west corner of Reservation and known as a mound, two and one-half feet in diameter and two feet high with the sod taken from the south side and said mound is further described as being 16 rods south of 60 rods west of a small branch creek, thence north 15 miles 260 rods to Middle Creek, said Creek is 24 feet wide and runs to the South-west, thence north 2 miles 60 rods to North-west corner, and said corner is known as a mound 3 feet in diameter and 2 feet 6 inches high, sod taken from the west, thence east 17 miles 252 rods to south branch of Omaha Creek, said creek is 15 feet across, thence

> east three (3) miles 285 rods to the Missouri River, thence down said river to the place of beginning, and containing 300,00 acres of land, and said boundary line is further described by having mounds erected on the high ground from 80 rods to one mile apart, and so situated as to be visible from one to the other, and sod taken from the outside of said line as completed by me the 27th day of June A.D. 1855. W. Barnum, Surveyor.

Field Notes of the Boundary of the Omaha Indian Reservation, June 27, 1855, W. Barnum, Surveyor, Defendants' Exh. 4 @ 15, en 26.

From the notes of the surveyor, only limited information can be gleaned. The first being that the western boundary of the Omaha Reservation was 28 miles 660 rods from the starting point on the Missouri River, as it then flowed. *Id.* A rod is 16.5 feet. *Black's Law Dictionary, 1980.* Thus, the total distance of the original western boundary from the eastern limit of the Reservation is approximately 30.06 miles. The 1854 Omaha Reservation comprised what is now all of Thurston County and adjacent areas of Cuming, Burt and Dixon Counties. *Plaintiffs' Exh. 10 @ 7-8, n 21.*

In 1865, the treaty selling the northern part of the Omaha Reservation for use a homeland for the Winnebago Tribe, referred only to the "western boundary line of the reservation" when describing the land sale. *Treaty with the Omaha, 1865, 14 Stats., 667.* Other specific descriptions of the western boundary

line of the Omaha Reservation in subsequent Congressional acts have evaded discovery by this Court.

The parties actively dispute whether references in various executive reports following the 1882 Act to the western boundary of the Omaha Reservation being either 25 or 30 miles from the Missouri River help to confirm or to preclude a finding that the Reservation was diminished. *See, e.g. Plaintiffs' Exh. 1, Declaration of E. Greenwald*; *Plaintiffs' Exh. B* (*illustrative map of Omaha Reservation*); *Defendants' Exh. 22*; *Defendants' Exh. 4 @54-55 en 144.* Other than confirming the original distance as approximately 30 miles from the Missouri River to the western boundary, such random references do little but acknowledge the approximate distance across the southern border of the Reservation and conform to the lack of specificity in defining the boundaries that was commonplace in the era of surplus land acts. (The eastern boundary of the Omaha Reservation has been the subject of extended litigation resulting in the Omaha Tribe receiving Blackbird Bend, a peninsula of land in the State of Iowa, due to the change of the course of the Missouri River over time. *See, e.g. Wilson v. Omaha Tribe, 442 U.S. 653 (1979).* There is nothing in this record indicating that the change of course of the Missouri River altered the original relationship as noted in the 1855 survey.)

As discussed above, in 1953, Nebraska was a mandatory state for reassigning jurisdiction over tribes within its boundaries from the federal government and tribe to the State by virtue of P.L. 280. In

1968, Congress changed its position on the allocation of jurisdiction in Indian country by passing Act of April 11, 1968, Title IV, § 403, 82 Stat. 79, codified 25 U.S.C. 1323(a). *Walker v Rushing, 898 F.2d 672, 673-674 (8th Cir. 1990).* The United States Secretary of Interior was designated by the President to accept such retrocession on behalf of the United States. *Id., citing, Exec. Order No. 11,435, 33 Fed.Reg. 17,339 (1968)*

The process required the legislature of the State of Nebraska to formally request "retrocession" of the jurisdiction by resolution, which was passed by the Nebraska unicameral. *Walker v Rushing, 898 F.2d @ 674, citing Res. 37, 80th Neb.Leg. (1969)*; *Defendants' Exh. 30.* The retrocession approved by the legislature was partial in that it included only criminal jurisdiction, and only in Thurston County, and only for the Omaha Tribe, all while excluding jurisdiction over offenses involving the operation of motor vehicles on public roads or highways. *Id.* The partial retrocession was approved by the Eighth Circuit. *Omaha Tribe v. Village of Walthill, 460 F.2d 1372 (8th Cir. 1972).*

In 1969, the Secretary of the Interior accepted federal and tribal retrocession pursuant to the Presidential order. The acceptance contained a detailed description of the boundaries of the portion of the Omaha Reservation in Thurston County, Nebraska, which was the subject to the agreed retrocession of jurisdiction, as follows:

Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F.R. 17339), I hereby accept, as of 12:01 a.m., e.s.t., October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr., as follows: Commencing at the southwest corner of lot 8 of sec. 34, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence east to the northeast corner of T. 24 N., R. 7 E. of the Sixth Principal Meridian; thence south to the south line of the Omaha Indian Reservation as originally surveyed; thence east along the south line of the Omaha Indian Reservation as originally surveyed to the line between secs. 32 and 33, T. 24 N., R. 10 E. of the Sixth Principal Meridian; thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian; [thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian(sic – *repeats previous line*)]; thence east to the eastern boundary line of the State of Nebraska; thence in a northwesterly direction along said boundary line to the north line of sec. 36, T. 26 N., R. 9 E. of the Sixth Principal Meridian extended east; thence west along the section lines to the northwest corner of lot 1 of sec. 36, T. 26 N., R. 7 E. of the Sixth Principal Meridian; thence south to the northeast corner of lot 3 of sec. 12, T. 25 N.,

> R. 7 E. of the Sixth Principal Meridian; thence west to the northwest corner of lot 2, sec. 10, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence south along the west boundary line of the Omaha Indian Reservation as originally surveyed to the point of beginning except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th regular session on the 16th day of April 1969. WALTER J. HICKEL, Secretary of the Interior.

Defendants' Exh. 31.

Following the description of the boundaries on a plat map of Thurston County, the western boundary begins at "the southwest corner of lot 8 of sec. 34, T. 25 N., R. 5 E. of the Sixth Principal Meridian" which is just over the Thurston County line in adjacent Wayne County (assuming that county lines conform to township lines) approximating the original boundary as surveyed in 1855. The point of origin is approximately 29 miles from the point of intersection of the boundary of the Reservation with the current position of the Missouri River, also conforming to the 1855 survey.

The line then proceeds easterly following the southern line of Thurston County. The line turns north between sections 32 and 33, T. 24 N., R. 10 E. of the Sixth Principal Meridian, the sections being in

adjacent Burt County. The line turns east at the northwest corner of section 21, T. 24 N. R. 10E. of the Sixth Principal Meridian to the eastern boundary of the State of Nebraska. The line then continues along the eastern boundary of the State to the northern boundary of the Omaha Reservation.

Continuing along the boundary between the Winnebago and Omaha Reservations, the line continues westerly along this boundary to the northwest corner of lot 2, section 10, T. 25 N., R. 5E. of the Sixth Principal Meridian, which is again in the adjacent Wayne County. The line finally turns south "along the west boundary line of the Omaha Indian Reservation as originally surveyed to the point of beginning."

This description, prepared in 1970, and which is the culmination of an Act of Congress, approved by the Legislature of the State of Nebraska and the Omaha Tribe as well as President of the United States and his Secretary of Interior, contains the most complete legal description of the boundaries of the Omaha Reservation. It provides additional evidence of the subsequent history of the opened area indicating that the State of Nebraska, the United States government and the Omaha Tribe all understood that the retrocession covered the listed boundaries within Thurston County as late as 1970 and the description appears to conform with the original 1854 boundaries.

CONCLUSION

This case is considered on cross-motions for summary judgment. The undisputed facts of the case, stated by the parties in their briefs, have been considered together with the other facts raised in the lengthy discovery by each side. Material facts are not in dispute. The only disputed matters are the legal interpretations to be accorded to the facts, as analyzed under the guidelines of the United States Supreme Court.

After a thorough consideration, this Court finds that the 1882 Act contains none of the semantic cues raising presumptions of diminishment detailed by the Supreme Court. *Yankton, 522 U.S. 329 (1998)*; *Hagen v. Utah 510 U.S.399 (1994)*; *Rosebud v.Kneip, 430 U.S. 584 (1977)*; *DeCoteau v. District Court, 420 U.S. 425 (1975).* The Court further finds that the language employed in the statute aligns with language used in those cases in which the Supreme Court found that the reservation boundaries survived the sale and opening of the reservation for white settlement. *Solem v. Bartlett, 465 U.S. 463 (1984)*; *Mattz v. Arnett, 412 U.S. 481 (1973)*; *Seymour v. Superintendant, 368 U.S. 351 (1962).* The language of the 1882 Act does not support a finding of diminishment.

A review of the surrounding facts and circumstances related to the opening of the Omaha Reservation for settlement reveals a record that is rife with the same type of contradictions which have beset other courts in examining this line of inquiry.

However, there is no unequivocal support for a finding of diminishment and substantial evidence for finding that the boundaries of the Omaha Reservation were to be preserved following the sale of land in the western portion of the Reservation.

Finally, the subsequent history of the region contains demographic evidence and evidence of the failure of tribal administration in the contested area which have supported diminishment in cases where there is a clear presumption for finding diminishment. No such presumption exists in this case. "(S)ubsequent events and demographic history can support and confirm other evidence but cannot stand on their own; by the same token they cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." *Osage Nation v Irby, 597 F. 3d 1117, 1122 (10th Cir. 2010) (quoting, Midway Coal Mining Co. v Yazzie, 909 F. 2d 1387, 1396 (10th Cir. 1990).* Even if subsequent history could overrule contrary evidence, in this case, the subsequent history contains numerous contradictions and ambiguities which do not point in a single direction.

Applying the traditional canons of construction for cases involving Tribal jurisdiction to the facts and law of this case, the Court finds that both the "Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish" Omaha tribal lands, and therefore this Court is bound by the traditional solicitude of Courts toward Indian tribes to "rule that diminishment did

not take place and that the old boundaries survived the opening" of the Omaha Reservation pursuant to the Act of 1882. *Solem, 465 US.@ 472, citing Mattz, 412 U.S. @ 505*; *Seymour 368 U.S. 351(1962).*

Therefore, the motion of Plaintiffs for summary judgment relating to the intent of Congress to diminish the Omaha Reservation by enacting the 1882 Act is denied. The motion of Defendants for summary judgment relating to the preservation of the boundaries of the Omaha Reservation following the 1882 Act is granted.

Finding that the Omaha Reservation boundaries have not been altered, the Court examines the law relating to the right of the Omaha Tribe to promulgate regulations pertaining to alcohol sales, on the Reservation. In *Rice v Rehner*, the United States Supreme Court examined 18 U.S.C. section 1161, which provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

Rice, 463 U.S. 713, 716 (1983).

The United States Supreme Court construed this act, which ended the general prohibition of alcohol in Indian Country in effect since 1832, to require tribal regulations of alcohol within tribal boundaries to conform to state licensing schemes for alcohol control. *Id. @ 732.* Plaintiffs concede the right of the Omaha Tribe to regulate liquor sales on the Reservation in their first claim for relief. *Special Appearance and Complaint for Declarative and Injunctive Relief paragraph 64.*

No other issues are raised in Plaintiffs' petition. Any issue relating to the scope and extent of regulations under *Atkinson Trading Company Inc. v. Shirley, 532 U.S. 645 (2001)*, cited by Plaintiffs in their brief for summary judgment, are not presently before this Court.

NOW THEREFORE IT IS ORDERED as follows:

1. That the motion of Plaintiffs for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to diminish the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is denied.

2. That the motion of Defendants for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to preserve the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is granted.

DATED: February 4, 2013

BY THE COURT:

/s/ Mick Scarmon
Mick Scarmon
Chief Judge,
Omaha Tribal Court

IN THE OMAHA TRIBAL COURT
FOR THE OMAHA TRIBE OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, et al., Plaintiffs, v. MITCH PARKER, et al., Defendants.	CIV. No. 08-002

JUDGMENT

(Filed Mar. 4, 2013)

Pursuant to the Memorandum Opinion and Order entered February 4, 2013, IT IS ORDERED AND ADJUDGED as follows:

1. That the motion of Plaintiffs for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to diminish the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is denied.

2. That the motion of Defendants for Summary Judgment claiming that the Forty-Seventh Congress of the United States intended to preserve the boundaries of the Omaha Indian Reservation by passing the Act of August 7, 1882, 22 Stat., 341 is granted.

DATED: February 26, 2013.

BY THE COURT:

/s/ Mick Scarmon
Mick Scarmon
Chief Judge,
Omaha Tribal Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 1

(Filed Mar. 14, 2013)

[SEAL]

U.S. Department of Justice 503603

United States Attorney
District of Nebraska

1620 Dodge Street, Suite 1400 PH: (402) 661-3700
Omaha, Nebraska 68102-1506 FAX: (402) 661-3084

October 9, 2012

Governor David Heineman
Office of the Governor
P.O. Box 94848
Lincoln, NE 68509-4848

RE: Omaha Indian Reservation and the Village of Pender

Dear Governor Heineman:

As you know the exact location of the western border of the Omaha Indian Reservation in Thurston County has been a matter of longstanding dispute. Specifically, the issue has centered on the question of whether Congress had "diminished" the reservation by actions taken after the reservation's establishment that opened up certain areas for settlement. In practical effect, the primary question presented has been whether the Village of Pender is inside the exterior boundaries of the reservation.

The United States Department of the Interior recently concluded an extensive historical review of the matter. The Department of the Interior has advised us that it is their conclusion that the Omaha reservation was NOT diminished by subsequent Congressional enactment. Based upon the guidance provided by the Department of Interior, the United States Department of Justice has filed a brief in the Omaha Tribal Court in the case entitled *The Village of Pender, Nebraska, et al. v. Mitch Parker, et al.*, (Civ. No. 08-002, Omaha Tribal Court), taking the position that the reservation has not been diminished.

My office has contacted various stakeholders in this dispute to advise them of the position being advanced by the Departments of Interior and Justice. We have advised them that the United States Department of Justice intends to assert the same federal jurisdiction in Pender that we routinely exercise in other parts of "Indian Country". Despite the concerns of many, I doubt this will have significant impact on the average non-Native American resident of the Pender area given the relative demographics of the village.

Federal jurisdiction can be briefly summarized in a few points:

- "Major crimes", (murder, manslaughter, kidnapping, maiming, felony sexual assault, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary,

robbery, felony theft over $1,000), committed by Native Americans within the boundaries of the reservation, including those committed within the Village of Pender, are subject to federal prosecution in United States District Court.

- For all offenses committed by Native Americans there may be concurrent jurisdiction between the Tribe and the federal government. However, Native Americans who commit crimes within the boundaries of the reservation are not subject to prosecution in state court. An exception exists for those offenses involving the operation of motor vehicles on public roads or highways. Those offenses, if committed by Native Americans within reservation boundaries, are subject to prosecution in state court but not federal or tribal court.

- Any offenses committed by non-Native Americans against the person or property of Native Americans within reservation boundaries, including within the Village of Pender, are subject to federal prosecution in United States District Court but not in state or tribal court.

- Most offenses committed by non-Native Americans against the person or property of other non-Native Americans are not subject to federal or tribal prosecution. The state courts retain exclusive jurisdiction over most of such offenses. (There are exceptions for federal crimes of general applicability, e.g., bank robbery).

I hope this letter is helpful in understanding our position. Please call if you wish to discuss the matter in more detail.

Sincerely,

/s/ Deborah R. Gilg
DEBORAH R. GILG
United States Attorney
District of Nebraska

DRG/js

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EXHIBIT 1

(Filed Apr. 22, 2013)

IN THE DISTRICT COURT OF
THURSTON COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	CASE NO. CR 00-6
PLAINTIFF,	)	ORDER
VS.	)	
DAMON PICOTTE,	)	
RESPONDENT.	)	

This is a criminal prosecution for the offense of first degree murder that allegedly occurred within the boundaries of the Village of Pender, Nebraska. The complaint alleges that the Defendant did, on or about August 6, 1999, while in the County of Thurston and State of Nebraska, did then and there being, kill another person, to-wit: Nancy Napolitano, purposely and with deliberate and premeditated malice.

Following the filing of the Information, Defendant filed a "Motion to Quash/Dismiss for Lack of Jurisdiction." The Court received evidence on that motion on June 7, 2000, and heard arguments in respect to the issues raised by that motion on July 12, 2000. The parties have had an opportunity to submit briefs concerning the issues raised by that motion, including whether said motion is a proper way to raise the issue of lack of jurisdiction in a criminal

proceeding, whether the Court may raise the issue of jurisdiction sua sponte, and whether the state court system has jurisdiction over this case in light of the fact that the situs of the alleged crime occurred within an area that was once considered part of the Omaha Indian Reservation. The matter of jurisdiction is now ripe for disposition.

For the reasons set forth below, this Court now finds (1) Defendant's "Motion to Quash/Dismiss for Lack of Jurisdiction" should be overruled; (2) this Court has the inherent authority to raise and resolve the issue of whether this Court has jurisdiction to hear this case; (3) the offense alleged in the Information did not occur in "Indian Country" as that term is defined in 18 U.S.C. 1152(1948) and interpreted in controlling decisions of the United States Supreme Court and Eighth Circuit Court of Appeals, (Yankton Sioux Tribe v. Gaffey 188 F3d 1010; 8th Circuit 1999). Thus, this Court finds this matter is properly before the Court.

I.

MOTION TO QUASH/DISMISS FOR LACK OF JURISDICTION

For the reasons set forth below, this Court now finds that the Defendant's "Motion to Quash/Dismiss for Lack of Jurisdiction" should be overruled.

A motion to quash may properly be used to attack the certainty and particularity of an information in a criminal case "when there is a defect apparent on the

face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Neb. Rev. Stat. 29-1808 (Reissue 1995). Concerning the Motion to Quash, the Defendant has not shown any apparent defect on the face of the Information nor were any defects on the face of the Information argued in oral arguments. Furthermore, this Court does not find any defects apparent on the face of the record. Therefore, the Court overruled the portion of the Motion titled "Motion to Quash."

In a criminal action such as this one, Nebraska's criminal statutes do not authorize attacking jurisdiction by filing a "Motion to Dismiss for Lack of Jurisdiction." Neb. Rev. Stat. 29-1810 (Reissue 1995). The only clearly permissible exceptions to an indictment under Neb. Rev. Stat. 29-1807 (Reissue 1995), include filing a motion to quash, a plea in abatement, or a demurrer. Furthermore, case law indicates that a motion to dismiss is not among the permissible procedural possibilities and that jurisdiction may not properly be raised by such a motion. See, e.g., Interest of Floyd B, 254 Neb. 443, 450-51, 577N.W. 2d 535, 542-43(1998). Therefore, the Court overrules the portion of the Motion entitled "Motion to Dismiss" for lack of jurisdiction.

II.

INHERENT AUTHORITY OF THE COURT TO RAISE ISSUE OF JURISDICTION

This Court finds that it has the inherent authority to decide whether jurisdiction is proper in this case. The Nebraska Supreme Court has stated that "a district court has the power to question sua sponte at any time its statutory authority to exercise subject matter jurisdiction." See Ryan v. Ryan, 257 Neb. 682, 689, 600 N.W.2d 739, 744 (1999). Further, the "primary duty of the courts is the proper and efficient administration of justice." State v. Joubert, 246 Neb.287, 297, 518 N.W. 2d 887, 895 (1994). In this case, the parties agree that it would clearly be most efficient to determine if subject matter jurisdiction is proper prior to trial. This Court agrees. Therefore, this Court finds that it is proper to raise the issue of jurisdiction on its own initiative and determine if jurisdiction is proper in this case at this stage of the proceedings.

III.

"RESERVATION BOUNDARIES"

A preliminary issue in this case is whether the alleged crime occurred within the boundaries of the Omaha Indian Reservation in "Indian Country" as the term is defined in 18 U.S.C. 1151(1948). If the situs of the alleged crime was part of the Omaha Indian Reservation, Defendant contends that the federal court would have exclusive jurisdiction over

this case pursuant to the Major Crimes Act, 18 U.S.C. 1153 (1988).

This Court need not determine if this crime meets all of the criteria to fall within the Major Crimes Act, for the issue of whether the alleged crime occurred in "Indian Country" under 18 U.S.C. 1151 (1948) is dispositive.

The situs of the alleged crime, Pender, Thurston County, Nebraska, which lies west of the railroad right-of-way, was once within the boundaries of the Omaha Indian Reservation. The question before the Court, however, is whether the situs was a part of the reservation at the time of the alleged incident or whether the reservation had been diminished. For the reasons set forth below, this Court finds that the reservation has, in fact, been diminished and that the alleged crime did not occur in "Indian Country" as defined in 18 U.S.C. 1151 (1948) and interpreted in controlling decisions of the United States Supreme Court and Eighth Circuit of Appeals. Accordingly, this matter is properly before the Court.

The Court first considers the language of the 1882 Act of Congress that authorized the sale of part of the Omaha Indian Reservation west of the railroad right-of-way. Although Acts that contain language to cede, surrender, grant and convey the land clearly show an intent to diminish a reservation, the Supreme Court itself has stated that the omission of such language is not determinative on the issue of diminishment. Evidence of Congressional intent to

diminish the reservation in that Act is demonstrated by the fact that the lands lying east of the railroad right-of-way were treated differently from lands lying west of the right-of-way. The Native Americans consented to the sale of the land west of the right-of-way, and although the Act provided that the unallotted land east of right-of-way would be patented to the Omaha Tribe in common, no such provision was placed in effect for lands west of the right-of-way. The Omaha Tribe did not retain an interest in the lands opened for settlement west of the railroad right-of-way.

In addition to the language of the 1882 Act itself, the legislative history regarding the passage of this Act demonstrates that Congress intended to diminish the Omaha Indian Reservation west of the railroad right-of-way. Both parties have provided this Court with numerous exhibits to demonstrate the intent of Congress in passing this Act. Discussions concerning the sale of this land published in the Congressional Record clearly state that only the land east of the right-of-way would remain in the reservation following the passage of the Act and the sale of the land. The intent of both Congress and the Omaha Tribal representatives was to establish a new western boundary for the Omaha Indian Reservation by selling the land west of the right-of-way and relinquishing control of said land.

The history of the land west of the right-of-way since the passage of the Act further supports this court's conclusion that the reservation has been

diminished. Congress declared in an 1888 Act, that any homestead defaults on land west of the right-of-way would not revert to the Omaha Tribe but would be sold at public auction. Although unallotted land east of the right-of-way would be held by the Omaha Tribe, the Act demonstrates that it did not retain any interest in lands west of the right-of-way. Further, both the Bureau of Indian Affairs in 1964 and the United States Department of the Interior in 1989 have independently concluded that the Omaha Indian Reservation does not include the land west of the railroad right-of-way.

Finally, the current demographics of the lands west of the right-of-way confirm that the reservation has in fact been diminished. The unallotted lands west of the railroad right-of-way were settled by non-Native Americans and are currently owned by non-Indians. There is no allotment land, tribally owned land, or Indian trust land west of the right-of-way. The land west of the railroad right-of-way is routinely patrolled by State and Village of Pender officers; neither officers of the Tribe nor the Bureau of Indian Affairs have provided a law enforcement presence in the opened lands. The area west of the railroad right-of-way has lost its Indian character.

CONCLUSION

The Court hereby overrules Defendant's "Motion to Quash/Dismiss for Lack of Jurisdiction." This Court finds that it has the authority to raise the issue

of jurisdiction sue sponte. Further, this Court has considered the issue and hereby finds that the Omaha Indian Reservation has been diminished following the passage of the 1882 Act of Congress. This Court finds that the effect of that diminishment was to remove the lands west of the railroad right-of-way from the reservation. Hence, the situs of the alleged crime in this case did not occur within "Indian Country" for purposes of 18 U.S. C. Thus, this court finds that jurisdiction for this alleged offense is properly before this Court.

Dated this August 21 of 2000.

BY THE COURT:

/s/ Darvid D. Quist
DARVID D. QUIST,
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EXHIBIT 2

(Filed Apr. 22, 2013)

IN THE COUNTY COURT OF THURSTON COUNTY, NEBRASKA.

CASE NO. FE99-23

THE STATE OF NEBRASKA, Plaintiff,	)	
vs.	)	ORDER
DAMON PICOTTE, Defendant.	)	(Filed Apr. 14, 2000)

Now on this 10th day of November, 1999, this matter came on in chambers to consider setting a date for and unique aspects of a preliminary hearing, Thurston County Attorney, Albert E. Maul, represented the State. Robert W. Kortus represented the defendant. Paul R. Robinson presided. The defendant pointed out that a unique question of the jurisdiction of the Court existed. It was agreed that the alleged offense occurred in Pender, Thurston County, Nebraska, and that the defendant is an enrolled member of the Winnebago Tribe. The parties waived an evidentiary hearing on the question of jurisdiction of the Court and agreed to submit briefs. The Court received briefs from the parties as well as an Amicus brief submitted by attorney John Rockwell Snowden of the University of Nebraska College of Law.

On February 16, 2000, a hearing was held by conference call. Albert E. Maul represented the State of Nebraska and Robert W. Kortus represented the defendant. Paul R. Robinson presided. The parties were given until March 3, 2000, to submit responsive briefs. It was further agreed for purposes of the record, the exhibits submitted with the initial brief of the State would be Exhibit No. 1, and those submitted by the defendant would be Exhibit No. 2. The Court in receipt of the responsive briefs makes findings and orders as follows relative to the question of the jurisdiction of the Court.

The complaint alleges that the defendant did, on or about, August 6, 1999, while in the County of Thurston and State of Nebraska, did then and there being, did kill another person, to-wit; Nancy Napalatono, purposely and with deliberate and premeditated malice. The situs of the alleged event clearly is within the original boundaries of the Omaha Indian Reservation. The question before the court is whether the situs was still a portion of the reservation on the date of the alleged offense. If it is determined that the situs was part of the reservation, jurisdiction would be with the federal court as the defendant is an enrolled member of a tribe. However, if it is determined the situs was not a portion of the reservation, the matter is properly before the Court.

To resolve these questions, the Court first examines an 1882 Act of Congress that has been characterized as a surplus land act. The portion of the Omaha Reservation west of the railroad right-of-way was to

be sold and the net proceeds held for the benefit of the Tribe. The situs of the alleged offense is west of the right-of-way.

In summary, the State asserts that the effect of the passage of the Act and subsequent sales to non-Indians resulted in a diminishment of the reservation while the defendant maintains the land sold remained as part of the reservation. Examination of the Act, the Congressional Record and other exhibits submitted demonstrate that sale of the land was made with the approval of the Tribe and the proceeds were to be used for its benefit. It is also clear that the Act contained no language to cede, surrender, grant, and convey that other land surplus acts have contained. However, this Court notes that the U.S. Supreme Court has not found the omission of language of this nature is determinative of the issue of diminishment.

This Court is also cited to the fact that the land was not to be sold for set amount. However, the Act did provide for a minimum price per acre and a provision for resale should any buyers default.

Relative to diminishment, both parties cite this Court to various exhibits to determine the intent of Congress in passing the Act. In this regard, the Court finds particularly telling the statement of a proponent of the Act relative to the number of acres that would be left in the reservation after the contemplated sale.

It is also apparent to this Court it was also the intention of the Tribe to establish a new western boundary to the reservation. The passage of the Act

was not intended by the Congress or the Tribe to sell surplus parcels within the reservation, but to relinquish control and sell a portion of the reservation.

The history of the land west of the right-of-way evidences this position of the Tribe. The Tribe has not attempted to exert jurisdiction. Neither officers of the Tribe nor the Bureau of Indian Affairs have provided a law enforcement presence. Finally, the demographics clearly show a lack of interest in this land by the Tribe; there is no allotment land, tribally owned land, or any trust land in this area.

Considering the briefs and many exhibits submitted, the Court finds that the passage of the 1882 Act of Congress resulted in diminishment of the Omaha Reservation. The Court further finds that the effect of the diminishment was to remove that portion of the reservation west of the railroad right-of-way. Hence, jurisdiction of the alleged offense would not reside with the federal courts as situs of the offense was no longer "Indian Country", for purpose of 18 U.S.C. ss 1151.

CONCLUSION

This matter is properly before the Court and it should be set for a preliminary hearing.

BY THE COURT:

[SEAL] /s/ Paul R. Robinson
Paul R. Robinson, County Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT 3

(Filed Apr. 22, 2013)

STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
[SEAL] TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

DATE: July 23, 2001

SUBJECT: Clarification of Attorney General's Statement Submitted By Former Attorney General Clarence Meyers Dated September 19, 1973, As To What Is The State's Regulatory Authority To Enforce State Laws and Regulations Governing Discharges of Pollutants to Waters Within the Exterior Boundaries of Tribal Reservations, Specifically for Walthill and Pender, Nebraska

REQUESTED BY: Mr. Michael J. Linder Director, Nebraska Department of Environmental Quality

WRITTEN BY: Don Stenberg, Attorney General and Melanie J. Whittamore-Mantzios, Assistant Attorney General

We view your request dated May 8, 2001, as asking the following two questions:

> 1. Whether or not a Statement given by Attorney General Clarence Meyers on September 19, 1973, included a jurisdictional statement on the State's authority to regulate water discharge facilities on non-Indian-owned land within the exterior boundaries of a reservation; and
>
> 2. Whether our office can supplement the September 19, 1973, Statement to include a Statement concerning the State's authority to regulate non-Indians on non-Indian-owned land within the exterior boundaries of a reservation.

Our short response to the first question is that the September 19, 1973, Statement does not include a jurisdictional Statement as to the State's authority to regular water discharge facilities on non-Indian-owned land within the exterior boundaries of a reservation. Our short response to the second question is that we are unable to supplement the Statement as you have requested.

First Question

You have requested that we clarify the Attorney General's Statement dated September 19, 1973, submitted by former Attorney General Clarence Meyers (hereinafter referred to as "the Statement").

The Statement was issued in order to obtain delegation from the United States Environmental Protection Agency (EPA) for the Nebraska Department of Environmental Control (presently known as the Department of Environmental Quality) to administer and enforce the provisions of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Federal Water Pollution Control Act Amendments of 1972. The Statement certified that Nebraska laws and regulations provided authority for the Department of Environmental Control to carry out a permit program for the discharge of pollutants by new and existing point sources to the same extent as required under the NPDES program administered by EPA. Nebraska's program was approved on June 12, 1974. The municipal waste water treatment plants (WWTP) in Walthill and Pender, Nebraska were identified in the Statement as needing NPDES permits.

In 1993 the EPA issued notice in the *Federal Register* that the EPA had never expressly authorized any State to operate an NPDES permit program on Indian lands despite the fact that some States had issued permits in Indian land. In Nebraska some of these NPDES permits in Indian land have been issued and reissued three times or more. In 1997 the Nebraska Department of Environmental Quality (DEQ) proposed to issue NPDES permits to the Walthill and Pender WWTPs. Both Walthill and Pender appear to be within the exterior boundaries of the Omaha Reservation. EPA raised objections to

DEQ issuing NPDES permits to the Walthill and Pender WWTPs. These objections were reaffirmed after a public hearing by the Director of the Water, Wetlands and Pesticides Division of the EPA, on April 13, 2001. It is the EPA's contention that the state of Nebraska was not given the authority to issue NPDES permits within the exterior boundaries of reservations.

It appears that in 1973 and 1974 neither the EPA nor this Office contemplated that there would be a need to have a jurisdictional statement regarding the State's environmental regulatory authority in Indian land. The Statement was made on a form provided by the EPA. Nowhere on the form was there a space to list the State's authority within the exterior boundaries of an Indian Reservation. The State's regulatory authority in Indian country did not appear to be an issue with the EPA until 1993. It also appears that in 1973-75 the EPA may have believed that the State had civil regulatory authority over reservations based upon Public Law 280. The U.S. Supreme Court determined in *Bryan v. Itaska*, 426 U.S. 373 (1976), that Public Law 280 did not give states civil regulatory authority in Indian country. The EPA did not object to the State issuing NPDES permits to the Walthill and Pender WWTPs until 1997.

The answer to your first question is that the Statement does not address the State's authority to regulate non-Indians on non-Indian owned land within an Indian Reservation. Neither the EPA nor this office believed that such a jurisdictional question

needed to be addressed when the Statement was issued on September 19, 1973.

Second Question

You also have requested that we issue a supplement to the Statement which indicates the extent of the State's authority to regulate non-Indians on non-Indian owned land within the exterior boundaries of the tribal reservation. We are unable to give a definitive supplement to the Statement on the State's authority to regulate non-Indians on non-Indian owned land within the boundaries of tribal reservations. We are unable to do so because it appears to us that in the balancing of the state, federal, and tribal interests in enforcing environmental regulations, the tribal interest outweighs the State's. We reach this conclusion based upon the policy adopted by Congress and the courts against "checkerboard jurisdiction" on Indian land and the tribe's inherent authority to control conduct that poses a risk to the tribe's health or welfare.

A. Policy Against Checkerboard Enforcement

The EPA uses the definition of Indian country found in 18 U.S.C. § 1151 to describe what constitutes Indian land. Section 1151 defines Indian country as follows:

> a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance

> of any patent, and including rights-of-way running through the reservation; b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and c) all Indian allotments, the Indian titles to which have not been extinguished, including rights -of-way running through the same.

In *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962), the Court stated the following regarding its interpretation of § 1151(a) as applied to the state's criminal jurisdiction on non-Indian owned land within a reservation:

> For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

Seymour, 368 U.S. at 358. Such reasoning has been applied with equal force to an environmental regulation question on Indian Land.

In *Arizona Public Service Company v. Environmental Protection Agency*, 211 F.3d 1280(C.A.D.C) *cert. denied*, ___ U.S. ___, 121 S.Ct. 1600 (2000), the court found that the tribe had the authority pursuant to a congressional delegation found at 42 U.S.C.§ 7601(d)(1)(A) to regulate the air quality on all land within the reservations, including fee land held by private landowners who are not tribe members. When the EPA promulgated rules to implement the 1990 Amendments of the Clean Air Act, they found the 1990 Amendments were a delegation of federal authority to regulate air quality to Native American Nations within the boundaries of reservations, regardless of whether the land is owned by tribes. The court rejected the Arizona Public Service Company's contention that the delegation to the tribe did not include the Tribe's authority to regulate land owned by non-tribal members, "Accepting petitioners' interpretation of the 1990 Amendments would result in a 'checkerboard' pattern of regulation within a reservation's boundaries that would be inconsistent with the purpose and provisions of the Act." *Arizona Public Service Company*, 211 F.3d at 1258.

B. Inherent Authority of the Tribe Over Conduct of Nonmembers that Threatens the Health Or Welfare of the Tribe.

Our second reason for determining the State may lack authority to regulate under the NPDES permit program on reservation land owned in fee by nonmembers of the tribe is the inherent authority of the tribe to regulate non-members' conduct within the exterior boundaries of the reservation. For the most part a tribe will lack authority to regulate nonmembers on reservation land owned in fee by nonmembers of the Tribe. In *Montana v. U.S.*, 450 U.S. 544 (1981) the Crow Tribal Council passed a resolution prohibiting hunting and fishing within the reservation by anyone who was not a member of the Tribe. The State of Montana continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation. The Court resolved the question of when a tribe had exclusive jurisdiction over the on-reservation activities of nonmembers on land owned in fee by nonmembers of the tribe.

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe* . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.* But the powers of self-government, including the power to prescribe and

> enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. Ibid. (Emphasis added.)

Montana, 450 U.S. at 564 citing to *United States v. Wheeler*, 435 U.S. 313, 326. The Court found that in the absence of express authorization by federal statute or treaty, tribal authorities typically would not have jurisdiction over non-members within the reservations boundaries except for two situations. One is where a non-member enters into a consensual relationship with the tribe. *Montana*, 450 U.S. 565. The second situation is when the conduct of non-members "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565. The Court did not find that the regulation of hunting and fishing on reservation land owned in fee by nonmembers of the Tribe represented a threat to the political integrity, the economic security, or the health or welfare of the tribe.

Thus in the situations where the tribe has inherent authority to regulate non-members on reservation land owned in fee by nonmembers of the Tribe, the State will lack the authority to regulate. Where the tribe does not have the authority by congressional delegation, treaty or inherent authority to regulate nonmembers on reservation land owned in fee by nonmembers of the tribe, the State is free to regulate. Since *Montana* the Court has determined that the

threat to the tribe's political integrity, economic security, or health, or welfare must be serious and substantial for the tribe's inherent authority to exist. *Brendale v. Confederated Yakima Nation*, 492 U.S. 408, 431, 447 (1989) and *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). In *Strate* the Court rejected the idea that careless driving on roadways within the reservation amounted to enough of a threat to the safety of the tribe to invoke the Tribe's inherent authority over nonmembers who were involved in an accident on the highway within the exterior boundaries of the reservation.

> . . . Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned.
>
> The Court's statement of *Montana's* second exceptional category is followed by citations of four cases, *ibid*; each of those cases raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government. In two of the cases, the Court held that a State's exercise of authority would so intrude, and in two, the court saw no impermissible intrusion.
>
> The Court referred first to the decision recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties

> belonged to the Tribe and resided on its reservation. See *Fisher [v District Court*, 424, U.S. 382,] 386, 96 S.Ct., At 946, *supra*, at 12. Next, the Court listed a decision holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store. See *Williams [v. Lee]*, 358 U.S. at 220, 79 s.Ct. At 270-271 ("[A]bsent governing Acts of Congress, the question [of state -court jurisdiction over on-reservation conduct] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."). Thereafter, the Court referred to two decisions dealing with objections to a county or territorial government's imposition of a property tax on non-Indian-owned livestock that grazed on reservation land; in neither case did the Court find a significant tribal interest at stake. See *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129, 26 S.Ct. 197, 200-201, 50 L.Ed. 398 (1906) ("the Indians' interest in this kind of property [livestock], situated on their reservations, was not sufficient to exempt such property when owned by private individuals, from [state or territorial] taxation"); *Thomas v. Gay*, 169 U.S. 264-273, 18 S.Ct. 340, 343, 42 L.Ed.740 (1898) ("[territorial] tax put upon the cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians").

Strate, 520 U.S. at 458-459.

In 1987 Congress amended the Clean Water Act to provide that federally-recognized Indian tribes may

be treated in the same manner as states for a number of purposes, including administering the NPDES permitting program. 33 U.S.C. § 1377(e). Regulations governing authorization of the NPDES program to Indian tribes were promulgated in 1993, and are found at 40 C.F.R. § 131.8. The EPA regulations require the following for a Tribe to obtain treatment as state status:

1. The tribe must be federally recognized and exercising governmental authority;
2. The tribe must have a governing body carrying out "substantial governmental duties and powers;"
3. The water quality standards program which the tribe seeks to administer must "pertain to the management and protection of water resources," which are "within the borders of an Indian reservation;"
4. The Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations.

40 C.F.R. § 131.8(a). EPA requires that the tribe show that the regulated activities affect "the political integrity, the economic security, or the health or welfare of the tribe." Final Rule, 56 Fed. Reg. At 64,877, (quoting *Montana v. U.S.*, 450 U.S. at 565). Additionally, the potential impacts of regulated activities on the tribe must be "serious and substantial." 56 Fed. Reg.

at 64,878. No tribe in Nebraska has yet received TAS status. EPA will issue the NPDES permits within the exterior boundaries of the reservation when neither the tribe nor the state have been given that authority.

In *Montana v. United States Environmental Protection Agency*, 137 F.3d 1136, (9th Cir.) *cert. denied* 525 U.S. 921 (1998), the court upheld the grant of treatment-as-state (TAS) status to the Confederate Salish and Kootenai Tribes under the Clean Water Act. The EPA's grant of TAS status to the tribes allowed the tribes to establish water quality standards for the reservation, including land owned by non-members. The State of Montana objected to the tribes' jurisdiction over non-member-owned land within the reservation. The land within the Flathead Reservation reflects a pattern of mixed ownership and control between tribal and non-tribal entities. The court found that the Confederate Salish and Kooentai Tribes had the inherent authority to regulate the water based upon the tribes' inherent sovereignty.

> In their application for TAS status, the Tribes identified several facilities on fee lands within the Reservation that have the potential to impair water quality and beneficial uses of tribal waters. These include feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills. Other actual or potential point sources include wastewater treatment facilities, commercial fish ponds and hatcheries,

> slaughterhouses, hydroelectric facilities and wood processing plants.

Montana v. U.S. EPA, 137 F.3d at 1139-1140. The court agreed with the EPA that the activities of non-members posed such a serious and substantial threat to Tribal health and welfare that Tribal regulation was essential.

Neither the EPA nor the Ninth Circuit required the tribe to make a significant showing that potential pollutants to water could pose a substantial and serious threat to the Tribal health and welfare. In fact the court stated the following about the necessary showing:

> EPA believes that tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial due to "generalized findings" on the relationship between water quality and human health and welfare. See id. Nonetheless, under the Final Rule EPA will make a case-specific determination on the scope of each tribal applicant's authority. See id. Because EPA's generalized findings will be incorporated into the analysis of tribal authority, the factual showing required under § 131.8 is limited to the tribe's assertion that (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under CWA, and (3) impairment of waters would have a serious and substantial effect on the

> health and welfare of the tribe. See id. At 64,7879.

Montana v. U.S. EPA, 137 F.,3d at 1139.

It is our understanding that the Pender WWTP discharges into the Logan Creek Dredge. The Logan Creek Dredge runs mostly through fee land but does run through a small parcel of allotted land within the exterior boundary of the Omaha Reservation. The Walthill WWTP discharges into the South Omaha Creek, which runs north about five miles before crossing into the Winnebago Reservation. The South Omaha Creek appears to mostly cross fee land, but does also cross allotted land and tribal trust land. We believe the EPA and Ninth Circuit Court of Appeals reasoning in *Montana v. U.S. EPA* would weigh against state regulation of the waters in Logan Creek Dredge and the South Omaha Creek to the extent the bodies of water are within the exterior boundaries of the Omaha Reservation.

Additionally, in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), the court affirmed the tribe's ability to establish more stringent standards than the federal ones when the tribe had obtained TAS status. The challenge arose when the city learned that EPA was in the process of revising the city's NPDES permit to meet the reservations' standards. The city was not in the reservation but its waste treatment facility dumped into the river five miles upstream from the reservation. The court upheld EPA's ability to enforce the tribe's more stringent

standards on the city of Albuquerque despite the fact it was outside of the exterior boundaries of the reservation.

C. Has The Omaha Reservation Been Diminished?

We do believe a question exists as to whether Pender and Walthill are within the exterior boundaries of the Omaha Reservation. First, on August 7, 1882, the Omaha Reservation was diminished by a Congressional act which approved of an Agreement with the Omaha Tribe and the Secretary of the Interior made in 1880. In the 1880 Agreement the Omaha Tribe agreed to authorize the Secretary of the Interior to cause to be sold to settlers the portion of the Omaha Reservation to the west of the Sioux City and Nebraska Railroad right-of-way, now the Chicago, St. Paul, Minneapolis, & Omaha Railroad. 22 Stat. 34. The Bureau of Indian Affairs has made note of such a diminishment on a map of the Omaha Reservation the Bureau created on October 6, 1964. *See also, South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (the Court found the Yankton Sioux Reservation was diminished by an 1894 Act of Congress which approved of an Agreement with the Yankton Sioux Tribe to cede unallotted land to the United States for settlement). A large portion of Pender lies outside the diminished boundaries of the Omaha Reservation as a result of the 1882 Act. However, it is our understanding that the Pender WWTP in question lies on the right-of-way of the railroad and would

therefore be within the reservation land that was not severed by the 1882 Act.

There may be an argument that the Omaha Reservation has been further diminished beyond the severed land mentioned in the 1882 Act. Recently, the Eighth Circuit Court of Appeals found that the Yankton Sioux Reservation has been diminished beyond the land ceded by the Tribe in an 1892 Agreement that was ratified by Congress in 1894. *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999) *cert. denied* 530 U.S. 1261 (2000). South Dakota argued to the district court that the Yankton Sioux Reservation had been disestablished by the 1894 Act. The Eighth Circuit Court of Appeals rejected South Dakota's contention on the disestablishment of the reservation. "If Congress' general understanding that tribal ownership was a necessary component of reservation status controlled, all land which passed out of tribal ownership would necessarily be found to have lost its reservation status – a conclusion the Supreme Court has explicitly refused to adopt." *Yankton*, 188 F.3d at 1023, citing to *Solem*, 465 U.S. at 4698-469, 104 S.Ct. 1161. However, the court did find that the Yankton Sioux Reservation had been diminished beyond the ceded land identified in the 1894 Act.

The court in *Yankton* looked at legislative intent at the time the 1894 act was passed and historically what the parties believed at the time.

> Congressional intent is the touchstone for analyzing whether the 1894 Act altered the status of

> the nonceded lands. *See Rosebud Sioux Tribe*, 430 U.S. at 586, 97 S.Ct. 1361. After land is set aside for an Indian reservation, it retains that status until Congress explicitly indicates otherwise. *See Solem*, 465 U.S. at 470, 104 S.Ct. 1161. Intent to diminish or disestablish a reservation must be "clear and plain." *United States v. Dion*, 476 U.S, 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986). Such an intent must be "expressed on the face of the Act or be clear from the surrounding circumstances and the legislative history. Whether Congress intended to disestablish the reservation completely, or whether it intended all or some of the nonceded land to retain its reservation status is complicated by the fact that modern distinctions between different categories of Indian country were not recognized by nineteenth century legislators who had a different understanding of the requirements for land to be classified as reservation land and/or Indian Country.

Yankton, 188 F.3d at 1021.

> Members of Congress in 1894 operated on a set of assumptions which are in tension with the modern definitions of Indian country, and the intentions of that Congress and of the 1892 negotiating parties are what we must look to here. At the turn of the century, Indian lands were defined to include "only those lands in which the Indians held some form of property interest: trust lands; individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians." *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. Lands to which the Indians did not have any property rights were never

> considered Indian country. The notion of a reservation as a piece of land, all of which is Indian country regardless of who owns it, would have thus been quite foreign. Congress in the late nineteenth century was operating on the assumption that reservations would soon cease to exist. *See id*, and on the belief that allotting lands, and purchasing those left unallotted, were steps in the process of eventually dismantling the reservation system. *See United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 695 (9th Cir. 1976). The 1894 Congress would have felt little pressure to specify how far a given act went toward diminishing a reservation and would have had no reason to distinguish between reservation land and other types of Indian country. *See id.*

Yankton, 188 F.3d at 1022. The court found that the primary purpose of the 1892 agreement was to cede the unallotted surplus lands on the Yankton Sioux Reservation to the United States.

Additionally, the court recognized that the Commissioners who negotiated with the Yankton Tribe emphasized the perceived need for the Tribe to assimilate into the white culture. The court found that the Yankton Sioux Reservation was diminished beyond the ceded land for the following reasons:

> In sum, the 1894 Act did not clearly disestablish the Yankton Sioux Reservation, but it intended to diminish the reservation by not only the ceded land, but also by the land which it foresaw would pass into the hands of the white settlers and homesteaders. The text of the 1894 Act,

> read in its full historical context, establishes that the intent was to cede certain lands to the United States and to open areas of the Yankton Sioux Reservation to white settlers, as well as to reserve land to be used to care for continued tribal interests. Until the Indian allottees would receive their lands in fee and the trust period over them would end, they could not convey land to non Indians. It was then foreseen that the trust period over the allotments would at some point come to an end, but we note that some of this allotted land apparently remains in trust to this very day.

Yankton, 188 F.3d at 1028.

The court also considered the treatment of the Yankton Sioux Reservation area in the years following the passage of the act, such as the fact the State had assumed primary jurisdiction over unallotted lands that had passed out of trust status. The court remanded the case to the district court to determine to what extent the Yankton Sioux Reservation had been further diminished beyond the ceded land identified in the 1894 Act.

Nebraska may be able to make an argument similar to South Dakota's in the *Yankton* case as to the diminishment of the Omaha Reservation. We do understand that the EPA and the Bureau of Indian Affairs will not agree with such a contention given their explicit finding that the Walthill and Pender WWTPs are within the exterior boundaries of the Omaha Reservation. *See*, EPA's Reaffirmation of Objections to State Issued Permits, Walthill and

Pender, Nebraska, Appendix, p. 1, Response to Comments – Summary A.

In the Treaty With the Omaha, 1865, the Omaha Tribe ceded the northern portion of their reservation for the Winnebago Reservation for the sum of $50,000. In that same 1865 Treaty, Congress provided for the assignment of property to Omaha Tribal members and the discontinuation of the tenure in common by which the Omaha Tribe was then holding their land. Article 4 of the 1865 Treaty provided the following:

> The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands . . . The land to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior and when approved by him,

> shall be final and conclusive . and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe . . .

Treaty with the Omaha, 1865, Article 4, 14 Stat. 667. In January 1882, a considerable number of Omaha assignees, memorialized Congress as follows:

> "We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.
>
> "We therefore petition your honorable body to grant to each one a *clear and full title* to the land on which he has worked.
>
> "We earnestly pray that this petition may receive your favorable consideration, for we now labor with discouragement of heart, *knowing that our farms are not our own, and that any day we may be forced to leave* the lands on which we have worked. We desire to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, *we ask of you titles to our lands.*

United States v. Chase, 245 U.S. 89, 97-98 (1917), citing to Sen. Misc. Doc., No. 31, 47th Cong., 1st Sess.

(Emphasis added). On August 17, 1882, Congress granted the Omaha Tribe's request and provided for allotments of Indian land wherein trust patents would issue and the tribal members would be able to acquire full patents to the land after 25 years. 22 Stat. 341. The 1882 Act also provided that at the conclusion of the 25 years, the tribal members would become subject to state law, both civil and criminal. As a result of the 1882 Act, 230 certificates of assignment were surrendered out of 297 outstanding certificates and most of the certificate holders took the assigned tracts for their allotments. *Chase*, 245 U.S. at 99.

In *Chase, Jr. v. United States*, 256 U.S. 1 (1920), the Court affirmed the denial of an Omaha Indian member's claim of his right to select an allotment from the Omaha Reservation based upon the Act of 1882, which was later amended in 1893. Section eight of the 1882 Act provided that the residue of lands that were not allotted would be patented to the tribe and held in trust for 25 years, and then said residue would be conveyed in fee discharged of the trust. However, section eight of the 1882 Act provided that from these lands held in trust by the tribe, allotments of one-sixteenth of a section should be made and patented to each Omaha child who might be born prior to the expiration of the 25 year trust period. No such patent of the residue land was ever issued to the Tribe. The 1893 Amendment provided that the Secretary of Interior was authorized with the consent of the Indian tribe to allot in severalty to each Indian

woman and child of the tribe born since allotments of land were made and now living one-eighth of a section of the residue lands held by that tribe in common instead of one-sixteenth. C. 209, 27 Stat. 630. Chase was not born until after the 1893 act was passed.

On May 11, 1912, Congress authorized the Secretary of the Interior to sell all unallotted land within the Omaha Reservation to the highest bidder. C.121, 37 Stat. 111. In *Chase, Jr.*, the Court held that the 1912 Act repealed the 1882 Act and the 1893 amendment to the extent they provided that the trust land that was to be held for the tribe would pass in allotments to children who were born during the trust period. The Court quoted the following from the Court of Appeals:

> "The Secretary of the Interior, of course, could not allot the unallotted lands under the Act of 1882 and also sell them under the Act of 1912; nor could he allot the unallotted lands and at the same time make the reservations which he is commanded to make by section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question."

Chase, Jr., 256 U.S. at 9. Section 2 of the 1912 Act provides the following:

> That the Secretary of the Interior is hereby directed to reserve from sale under the terms of this Act, the following tracts of land for the purposes designated: Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the

> need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; two acres of the land on which is standing what is known as the old Presbyterian mission building, patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska: *Provided*, That of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for town-site purposes one hundred and sixty-four acres other than the forty-nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this Act, and the streets, alleys, and parks are herby dedicated to public use: *Provided further*, That the lands allotted, those retained or reserved and the surplus lands sold, set aside for town-site purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Ch. 121, 37 Stat. 111, § 2. Section 2 of the 1912 Act is significant to making a case for diminishment. The last sentence quoted from Section 2 indicates that it was indeed the intent of Congress to diminish the boundaries of the Omaha Reservation. If the identified properties were to remain within the reservation, this last sentence would be unnecessary. The laws

of the United States prohibiting the introduction of intoxicants into the Indian country would be applicable without this provision. Both the U.S. Supreme Court and the Eighth Circuit Court of Appeals reached this conclusion as to the diminishment of the Yankton Sioux Tribe from a similar prohibition to the introduction of alcohol in the 1894 Act. *Yankton*, 118 S.Ct. At 801. "In this article the parties acknowledged the continued existence of two distinct categories of land to which different laws might apply." *Yankton*, 188 F.3d at 1027.

The 1882 Act did not specify that the land west of the railroad right of way would remain a part of the reservation. The fact that the authorization of the Secretary of the Interior to sell these lands to settlers in the same act that anticipated the ending of the trust status of lands after twenty-five years, could support the view that the reservation was diminished. It appears that Congress was seeking to phase out its supervision of the Indian lands, it being only a matter of time before the Indians were to assume their role as ordinary citizens of the State.

Summary

The answer to your first question is that the Statement does not include a jurisdictional statement as to the State's authority to regulate non-Indian owned land within the exterior boundaries of a reservation. Neither the EPA nor this office believed that such a question needed to be addressed in 1973. We are unable to supplement the Statement to

demonstrate the State's authority to regulate water discharge facilities on non-Indian owned-land within the exterior boundaries of a reservation. We are unable to do so because the tribe's interest in regulating its environment has repeatedly been found by the EPA and the courts to outweigh the states' interests. We do believe that a question exists as to whether the Pender and Walthill WWTPs are within the exterior boundaries of the Omaha Reservation based upon a possible diminishment of the Omaha Reservation by the 1882 Act, the 1912 Act, and the current status of the land.

Sincerely,

DON STENBERG
Attorney General

/s/ Melanie J. Whittamore-Mantzios

Melanie J. Whittamore-Mantzios
Assistant Attorney General

Approved:

/s/ Don Stenberg
Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, RON BRINKMAN, and VILLAGE OF PENDER, NEBRASKA, Plaintiffs, v. MITCH PARKER, in his official capacity as Chairman of the Omaha Tribal Council, BARRY WEBSTER, in his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, in his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, in his official capacity as Secretary of the Omaha Tribal Council, ORVILLE CAYOU, in his official capacity as member of the Omaha Tribal Council, ELEANOR BAXTER, in her official capacity as member of the Omaha Tribal Council, and ANSLEY GRIFFIN, in his official capacity as member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants.	Case No. 4:07-cv-03101 **JOINT STIPULATION OF FACTS** (Filed Jun. 10, 2013)

Pursuant to the Court's February 19, 2013, Memorandum and Order, the parties jointly submit the following statement of undisputed facts. To the extent any exist, the parties will submit any disputed facts in conjunction with their cross motions for summary judgment.

STATEMENT OF UNDISPUTED FACTS

Parties

1. The Village of Pender, Nebraska, ("Pender") is a village as defined by Neb. Rev. Stat. § 17-201 with a population of approximately 1,300 residents in northeastern Nebraska, and a Plaintiff in this litigation.

2. Pender is a political subdivision of the State of Nebraska, the County Seat of Thurston County and is governed by a Village Board of Trustees.

3. The remaining Plaintiffs are and were at all relevant times residents of Thurston County and owners of or agents for establishments engaged in the sale of alcoholic beverages in or near Pender, Nebraska. ("Beverage Retailers").

4. Donna and Richard M. Smith own Smitty City West, a convenience store located at 701 South 4th Street in Pender, Nebraska, Smitty City West has sold alcoholic beverages for the last 38 years.

5. Doug and Susan Schreiber own Schreibs Bar, a bar serving food located at 202 Main Street in Pender,

Nebraska. Schreibs Bar has sold alcoholic beverages for at least 11 years.

6. Rodney A. Heise owns the Other Side, a bar located at 219 Main Street in Pender, Nebraska. The Other Side has sold alcoholic beverages for at least 23 years.

7. Thomas J. Welsh owns Welsh's Bar, a bar located at 212 Main Street in Pender, Nebraska. Welsh's Bar has sold alcoholic beverages for at least 27 years.

8. Jay and Julie Lake own Pender Lanes, a bowling alley located at 415 South 4th Street in Pender, Nebraska. Pender Lanes has sold alcoholic beverages for at least 23 years.

9. Keith Brehmer is Commander of the American Legion Post 55 and the Pender Veterans Club, a veterans club located at 610 Main Street in Pender, Nebraska.

10. Ron Brinkman is President of the Board of the Twin Creeks Golf Club, a golf course located at Highway Nine North near Pender, Nebraska.

11. Each of the Beverage Retailers holds a valid liquor license from the State of Nebraska and has fully complied with all of Nebraska's requirements to engage in the retail sale of alcohol.

12. The Beverage Retailers' primary customers are not members of the Omaha Tribe, but rather non-member residents of Pender and the surrounding areas.

13. None of the Plaintiffs are members of the Omaha Tribe, parties to any contracts with the Omaha Tribe or involved in any other formal business relationship with the Tribe.

14. None of the Plaintiffs have applied for a license or remitted any taxes to the Omaha Tribe under the Beverage Control Ordinance.

15. The Omaha Tribe of Nebraska is a federally recognized Indian Tribe organized and chartered under the Indian Reorganization Act of 1934. Indian Entities Recognized and Eligible to Receive Services from U.S. Bureau of Indian Affairs Notice, 75 Fed. Reg. 60810 (Oct. 1, 2010

16. Defendants are or were at all relevant times members or officials of the Omaha Tribal Council.

The Beverage Control Ordinance License and Tax Structure

17. On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code. (Amendment (Title 8 of the Tribal Code) to Omaha Tribe's Beverage Control Ordinance, 71 Fed. Reg. 10056 (Feb. 28, 2006) (the ordinance, as amended, is hereinafter referred to as the "Beverage Control Ordinance.")

18. The purpose of the Beverage Control Ordinance "is to govern the sale, possession and distribution of alcohol within the Omaha Tribe's Indian Reservation."

19. The Beverage Control Ordinance requires establishments that sell alcohol to obtain a license for a fee that varies by license class, and imposes a ten percent sales tax on the purchase of alcohol from any licensee.

20. The licensing scheme contained within the Beverage Control Ordinance introduces three classes of liquor licenses – A, B, and C. Class A licenses are issued to "Package Dealers" and require a $1,000.00 application fee, Class B licenses are issued to "On-Sale Dealers" and require a $1,500.00 application fee, and Class C licenses are issued to "Wholesalers" and require a $500.00 application fee. Each license is valid for one year, but may be extended for an additional thirty days provided that a new license application is pending at the time of expiration. The Beverage Control Ordinance also institutes a 10% sales tax to be levied on the retail price of all sales of alcoholic beverages. The 10% sales tax must be remitted to the Omaha Tribe.

21. Any entity applying for a license under the Beverage Control Ordinance must also grant unlimited access to its books and premises to the Omaha Tribe. The Beverage Control Ordinance states: "[An applicant's] premises, for the purpose of search and seizure laws shall be considered public premises, and that such premises and all buildings, safes, cabinets, lockers, and store rooms thereon will at all times on demand of the Tribal Council or a duly appointed Tribal or Federal policeman, be open to inspection."

22. Non-tribal members who fail to comply with the licensing and taxing scheme imposed by the Beverage Control Ordinance are subject to administrative fines in the amount of $10,000.00 per violation.

Enforcement of the Beverage Control Ordinance

23. The Omaha Tribe has attempted to enforce the Beverage Control Ordinance against the individual Plaintiffs.

24. In particular, on December 19, 2006, Plaintiff Smith received a letter from the Omaha Tribe. The letter included an application to obtain a liquor license from the Omaha Tribe for Smitty City West and a request to remit the 10% alcohol tax imposed by the Beverage Control Ordinance on a monthly basis.

25. Smith did not take any action in response to the December 19, 2006 letter because he believed that his business, Smitty City West, was not located within the Omaha Indian Reservation nor was he affiliated with the Omaha Tribe.

26. On or about January 31, 2007, the Beverage Retailers received a Second Notice from the Omaha Tribe via registered mail. The Second Notice was addressed to "all manufacturers, importers, wholesalers, and retailers of alcoholic beverages within the Omaha Indian Reservation." This notice informed the Beverage Retailers that "the Omaha Tribe's Director of Liquor Control has determined that [they] are

subject to the requirements of the Alcoholic Beverage Control Title." The Second Notice also stated that because the Beverage Retailers were not in compliance with the Beverage Control Ordinance, they were subject to fines of up to $10,000.00 per violation. The Second Notice threatened "enforcement actions in Omaha Tribal Court."

27. On April 17, 2007, the United States District Court for the District of Nebraska granted Plaintiffs a temporary restraining order prohibiting the enforcement of the Beverage Control Ordinance in Pender, Nebraska, which was later extended by a stipulation of the parties. (Order, *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 (D. Neb. April 17, 2007); Stipulation, *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 (D. Neb. May 14, 2007).

28. On October 4, 2007, the United States District Court for the District of Nebraska stayed the original proceeding in order for the Plaintiffs to exhaust any potential remedies available in the Omaha Tribal Court. (Order, *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 (D. Neb. October 4, 2007).

29. On January 7, 2008, Plaintiffs filed an action in the Omaha Tribal Court seeking a judgment declaring that Pender is not within the boundaries of the Omaha Reservation and an injunction prohibiting the enforcement of the Beverage Control Ordinance in Pender.

30. Plaintiffs retained Emily Greenwald, Ph.D. as their expert witness to prepare a historical report.

31. Defendants retained R. David Edmunds, Ph.D., Watson Professor of American History for the University of Texas at Dallas, as their expert witness to prepare a historical report.

32. On February 4, 2013, pursuant to cross-motions for summary judgment, the Omaha Tribal Court determined that Congress did not "intend[ ] to diminish the boundaries of the Omaha Indian Reservation" in the 1882 Act.

33. Stipulating that exhaustion was complete, the parties returned to this Court for resolution of this matter.

The 1854 Treaty

34. In 1854, the Omaha Tribe entered into a treaty with the United States government in which the Tribe ceded to the United States "all their lands west of the Missouri River, and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha County, and forever relinquish all right and title to the country south of said line[.]"

35. In consideration of and payment for the land ceded by the Omaha Tribe, the United States agreed to pay the Omaha Tribe a sum certain paid over a certain number of years.

36. In the Treaty of 1854, the Omaha Indians also made a commitment to allow railroads to construct a right of way across their reservation at some point in the future, and, in 1880, they agreed to grant the Sioux City and Nebraska Railroad a right of way from the northern edge of their reservation generally southeastward until it crossed the southern boundary of the Omaha Indian Reservation.

37. In 1855, as a result of the 1854 Treaty, the actual boundaries of the Omaha Reservation were set and the original size of the Omaha Reservation was approximately 300,000 acres.

38. Pender is within the original boundaries of the Omaha Reservation as established in 1855.

1865 Omaha Land Sale: Winnebago Reservation

39. On March 6, 1865, the Omaha Tribe sold a portion of the Omaha Reservation to the United States for the sum certain of $50,000.00 for the establishment of the Winnebago Reservation.

40. The size of the Winnebago Reservation created by the 1865 Treaty was approximately 98,000 acres, leaving the remaining Omaha Reservation with approximately 202,000 acres.

41. The 1865 Treaty provided for the allotment of the remaining portion of the Omaha Reservation to individual Omaha Tribe members.

42. The 1865 Treaty provided that the Omaha Tribe was to "vacate and give possession of the lands ceded by this treaty immediately after its ratification."

43. The General Land Office ("GLO") conducted a survey of the remaining Omaha Reservation from 1866 to 1867 which was approved by the GLO commissioner in 1867.

44. In March 1871, the Omaha received certificates for their individual allotments.

45. All of the individual allotments were in the eastern half of the Omaha Reservation.

46. The Omaha Tribe members later learned that the certificates they were given for the allotments provided in the 1854 and 1865 Treaties did not provide fee-simple title to the land, causing the Omaha Tribe to request allotments that would guarantee fee-simple title to the reservation land so allotted.

47. The 1854 and 1865 Treaties provided for the Omaha Tribal members to be assigned individual allotments within the Omaha Indian Reservation. While allotments were made to individual Omaha Tribal members under the provisions of the 1854 and 1865 Treaties, those allotments did not grant fee-simple title to the possessors of the allotted land.

The 1872 Act Regarding the Western Portion of the Omaha Reservation

48. In August 1871, the Omaha chiefs appealed to Congress "to provide for the enactment of a law authorizing the sale of 50,000 acres of the most western portion of their reservation . . " to raise funds for farming and housing. Congress did not enact the requested legislation.

49. In October 1871, the Omaha chiefs sent a letter to Congress and "earnestly renew[ed] the petition presented to Congress at its last session" calling for "the sale of near 50,000 acres from the most western portion of our reservation as can be separated from the remainder by a line running along the section-lines from north to south."

50. On January 22, 1872, Commissioner of Indian Affairs F.A. Walker recommended the proposed legislation to Congress and stated, "I believe that the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy."

51. On June 10, 1872, Congress enacted legislation that authorized the Secretary of the Interior, with the consent and concurrence of the Omaha Tribe, to "cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south. The said lands so

separated shall be appraised . . . [and] the Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale for cash in hand."

52. The 1872 Act also contained provisions allowing other Indian Tribes to sell portions of their reservation lands.

53. Only 300.72 acres of the Omaha Reservation were actually sold under the terms of the 1872 Act. The Commissioner reported: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve."

1873 Ponca Agreement Regarding the Western Portion of the Omaha Reservation

54. On November 6, 1873, the Omaha and Ponca chiefs signed a resolution to sell a portion of the Omaha Reservation to the Ponca Tribe.

55. Both Tribes wished to settle the Ponca on the western part of the Omaha Reservation surveyed and appraised for sale in 1872.

56. The sale of land from the Omahas to the Poncas was never completed.

1874 Omaha Land Sale: Wisconsin Winnebagoes

57. In 1874, following the Omaha's unsuccessful attempt to sell land to the Poncas, Congress appropriated funds to purchase additional land from the Omaha Tribe for the Wisconsin Winnebagoes from the eastern part of the Omaha Reservation.

58. The amount of land sold to the Wisconsin Winnebagos was reported as 12,374.53 acres.

1880 Proposal Regarding the Western Portion of the Omaha Reservation

59. In 1880, Nebraska Senator Alvin Saunders again offered a bill to accomplish the sale of 50,000 acres from the western portion of the Omaha Reservation first proposed as part of the 1872 Act. In support of this effort, Senator Saunders stated: "The bill provides for a survey and sale of fifty thousand acres. There was a bill passed some eight years ago [the 1872 Act] authorizing the sale of this land, and only about three hundred acres of land were sold under it. The Secretary now recommends that we deduct that from this bill so that the survey may stand as it is, 49,461.71 acres instead of fifty thousand acres.

60. Later in the debate, Senator Saunders explained why the 1872 Act was unsuccessful: "Let me state the reason for it. A bill was passed some seven or eight years ago authorizing it to be sold in smaller tracts, but people would not go and settle around the Indians

when they could get lands as cheap or cheaper off a distance from them. The object now is that we may get, if possible, persons to emigrate in colonies and go and make their own settlements where they will not be isolated from society."

61. Senator Saunders went on to state: "The Indians want the land sold . . . [T]hey want this money put out at interest so that they can have the interest to use in improving their farms. They are very desirous to have the land sold. They even would have it sold at a lower figure than this bill names if it cannot be sold at that."

62. However, Senator Saunders' 1880 proposal did not advance.

1882 Act Regarding the Western Portion of the Omaha Reservation

63. On February 20, 1882, the Senate introduced Senate bill 1255, which provided for the sale of up to 50,000 acres from the western portion of the Omaha Reservation.

64. During the first floor debate on this bill, Senator Saunders stated: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed. The Indians want it passed so as to put the money derived from the sale on interest. The white people are there ready to buy the land and put it in cultivation."

65. In support of the bill, Senator Saunders read a letter into the record stating: "there are no Indians living on the western portion of the Omaha Reservation; that no land has been allotted to any of them so far as I can ascertain; and furthermore [ ] there are no improvements such as housing, fencing[ ] upon the 50,000 acres of land alluded to in your letter."

66. Senator Saunders also stated "Twice they have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold."

67. Senator Saunders explained that the 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." He went on to state that under the bill "[t]he lands that [the tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished."

68. Specific to the land west of the right of way, Senator Saunders explained that the Omahas did not want to live in the area to be sold. "I do not think an acre of this land will be sold to the Indians . . . ," and "I did not think as a matter of fact a single acre of land [west of the right of way] would go into the hands of Indians." Senator Saunders' belief was consistent with the report submitted by the local

agent which stated, "there are no Indians living on the western portion of the Omaha reservation."

69. Senator Dawes reported, "Last summer I saw the representatives of this tribe, and I heard them myself state . . . they were very anxious to sell a portion of their real estate and obtain the money, so that the interest of the money they could use for the improvement of the residue of their property. They had more land than they could occupy, as I heard them myself."

70. Senator Dawes explained, "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation, as much as, if all the Indians should take in severalty, would give each one a farm and have some left for such increase of numbers as might probably be expected in the next twenty-five years; that there was no apprehension on the part of the Department; they were satisfied."

71. On April 20, 1882, the Senate passed the bill and referred it to the House Committee on Indian Affairs.

72. On July 1, 1882, the House committee offered a substitute bill that authorized both the sale of land and allotment in severalty to the Omaha Tribe.

73. On July 26, 1882, Representative Dudley Haskell explained that before the western portion of the Omaha Reservation would be sold:

> [T]hey are at liberty to make their individual selections of one hundred and sixty acres to every head of family, eighty acres to every widow, and forty to every child. These severalty selections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to be issued in fee-simple. All the lands not allotted are to be patented under the broad seal of the United States to the tribe in common, so as to give them an absolute indefeasible title to about 100,000 [sic] acres.

74. On July 26, 1882, Representative Edward Valentine of Nebraska stated: "These Indians I know very well, and they are anxious to sell this portion of the reserve and have allotments made to them in severalty of the remainder. It is at their request, as I have stated, that the bill was drawn . . . "

75. On July 16, 1882, Representative Valentine also stated:

> I desire to say there is now a law [the 1872 Act] authorizing the Secretary of the Interior to sell 50,000 acres of that land. It embraces all the land mentioned in this bill and some other land in addition; and that land may be sold indiscriminately to any persons. It may be sold to persons not expecting to become actual settlers. After this railroad was built

> through there the Indians then asked that he sell no land under the law as it now exists, and made their petitions for a bill of this character, the one which is now pending before the House, and which was framed in accordance with their wishes.

76. Representative Valentine further explained:

> You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

77. Finally, Senator Valentine stated while specifically discussing the provision to allow Indians to select allotments west of the railroad right of way prior to the lands opening, "They do not care about making selections over on that side of the road at all."

78. On July 27, 1882, the House approved S. 1255 as amended to provide for both the grant of allotments to Omaha Tribe members from either the east or west portions of the Omaha Reservation as well as the sale of the remaining portion of the reservation west of the railroad right-of-way to white settlers.

79. Although initially referred back to committee by the Senate, the Senate withdrew its opposition to the House amendment to S. 1255.

80. On August 7, 1882, President Chester Arthur signed the bill into law.

81. The Act of August 7, 1882, § 1, provided:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

(Act of August 7, 1882, 22 Stat. 341) (see Attachment 1 for entirety of 1882 Act).

82. After the survey and appraisal, the Secretary of the Interior was "authorized to issue a proclamation to the effect that unalloted lands are open for settlement . . . "

83. Following the selection of allotments by Omaha Tribe members, the remaining unalloted lands east of the railroad right-of-way was patented to the Omaha Tribe in trust for twenty-five years.

84. After the twenty-five year trust period, fee patents would issue to the individuals and the Omaha Tribe.

85. The 1882 Act did not provide a sum certain to be paid to the Omaha Tribe but, rather, "the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hiring as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the U.S., and shall bear interest [at 5% annually], which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior."

Implementation of the 1882 Act

86. In April 1883, the Secretary of the Interior appointed Alice Fletcher as a special agent to oversee the allotment process.

87. Fletcher urged the Omahas to select land near the railroad right of way because she considered this

the best agricultural land and it also afforded rail access to markets.

88. While some of the Omahas accepted Fletcher's advice, most preferred the eastern part of the reservation for its access to water and timber.

89. In April 1883, Commissioner Price wrote to Fletcher directing her to "please ascertain whether any of the Indians desire to make their selections *west* of the right-of-way of the Sioux City and Nebraska Railroad Company. It is important that their wishes in that respect be made known at once in order that the appraisement of the lands lying west of the railroad may be proceeded with, if deemed desirable, without waiting for the completion of the allotments. . ."

90. Section 8 of the 1882 Act allowed the Omaha Tribe members to take their allotments anywhere on the reservation, including west of the railroad right of way.

91. At the end of 1883, Commissioner of Indian Affairs, Hiram Price, reported that 10-15 Allotments had been taken west of the railroad right of way and that 876 of the approximately 50,000 acres west of the railroad right of way had been allotted to Omaha Tribe members.

92. Upon completion of the initial allotment process, the land west of the railroad right-of-way was opened to settlers on April 30, 1884.

93. A total of 50,157 acres west of the railroad right-of-way were opened for settlement by non-Indians.

94. In 1885, Omaha and Winnebago Agent George Wilson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder."

95. In 1885, the Commissioner of Indian Affairs reported that "Omaha Reservation lands lying west of the Sioux City and Nebraska Railroad" had recently been sold to settlers, but that many of the latter had failed to pay for the acreages.

96. In 1887, the Secretary of the Department of the Interior referred to land west of the railroad right of way as "within the limits of the former Omaha Indian Reservation."

97. Congress authorized extensions of payment under the 1882 Act in 1885, 1886, 1888, 1890, and 1894. The extension of payment in 1894 provided that "this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained[.]" Further, non-Indian settlers on the reservation lands west of the railroad also requested the Omaha Tribe's acquiescence in the payment extensions. Federal officials agreed to the request and on December 23, 1895, the Omaha met in council with Indian Agent William Beck and gave their permission for payment schedules for reservation lands west of the railroad to be extended.

98. Under the terms of the 1888 extension, if a settler defaulted on payment for land west of the right-of-way, the land was to be sold at public auction rather than revert back to the Omaha Tribe. The proceeds from any sale of the land continued to inure for the benefit of the Omaha Tribe.

99. Congressional reports focusing upon this extension also refer to the land as being "on the Omaha Reservation" or individuals buying lands west of the railroad as "purchasers of land of the Omaha tribe."

100. All of the land west of the railroad right-of-way, apart from the 10-15 Indian allotments, was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913.

101. In 1900, Secretary of Interior Ethan Allen Hitchcock ruled that settlers who purchased land west of the railroad right of way were not subject to homestead legislation because they were settled on lands "in the Omaha reservation."

102. The land allotted to Indians west of the right-of-way was patented in fee simple by 1919, with no trust land remaining west of the railroad.

103. The Office of Indian Affairs ("OIA") report of 1884 did not include the land west of the railroad right-of-way as part of the reservation listing the size of the Omaha reservation as 142,345 acres.

104. The OIA report of 1888 did not include the land west of the railroad right-of-way as part of the reservation listing the size of the Omaha Reservation as 142,345 acres.

105. The OIA report of 1898 did not include the land west of the railroad right-of-way as part of the reservation listing the size of the Omaha Reservation as 142,344.63.

106. The OIA report of 1900 did not include the land west of the railroad right-of-way as part of the reservations total acreage, listing the size of the Omaha Reservation as 142,344.79 total allotted and unallotted acres.

107. In 1901, Indian Agent Charles Mathewson reported, "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and forms the southwestern boundary of the Omaha Reservation."

108. In 1906, OIA' s report did not include the land west of the railroad right-of-way as part of the reservation, listing 141,891 total allotted and unallotted acres.

109. In 1909, OIA's report did not include the land west of the railroad right-of-way as part of the reservation, listing 141,891 total allotted and unallotted acres.

110. In 1911, OIA's report did not include the land west of the railroad right-of-way as part of the reservation, listing 135,022 total allotted and unallotted acres.

111. In 1924, two Omaha tribal delegates inquired into the 1882 land sales regarding the amount of land sold, its value, the amount of interest due, and

whether the tribe had been paid for the value of land and interest.

112. In 1924, the Commissioner of the General Land Office reported: "Public sales have accordingly been held and all the moneys for which the lands were sold have been paid."

113. The 1935 Annual Statistical Report for the Winnebago Agency listed three "reductions" to the original acreage of the Omaha reservation, including the "[s]ale of land west of railroad, 50,157 acres."

Establishment and Population of the Village of Pender

114. Upon the opening of the area west of the right-of-way, W.E. Peebles purchased a tract of 160 acres, on which he platted the townsite for Pender. He conveyed a portion of the land to the railroad for a depot site. Lots within the town went on sale in April 1885.

115. Since the early, twentieth century, Indians have comprised less than two percent of the population west of the right of way.

116. Many Omahas regularly visited Pender, resided in the village, and conducted business there. Excerpts from the correspondence and diary of Rosalie Farley, whose allotments were located west of the railroad, indicate that her family resided on her allotment, and that she and other Omahas regularly visited Pender, conducted business at that location and even attended concerts in the village.

117. Between 1890 and 1895 Thomas Sloan, an attorney and member of the Omaha Tribe, maintained both a residence and a law office in The Village of Pender where he employed an Omaha as a clerical assistant.

118. Sloan also served as Mayor of the Village of Pender, Thurston County Surveyor, and Justice of the Peace.

119. Hiram Chase, another attorney and enrolled member of the Omaha tribe, resided and practiced law in Pender, where his children attended public schools.

120. Chase also served as Thurston County Attorney for eight years, before being elected as County Judge.

121. In *Hallowell v. United States*, 221 U.S. 317, 319-20 (1911), the United States Supreme Court restated the parties' stipulation of facts relied upon by the district court as follows:

> That the Omaha Indians exercise the rights of citizenship, and participate in the County and State Government extending over said Omaha Indian Reservation, and over and upon the allotments herein referred to. That the defendant, Simeon Hallowell, has been on frequent occasions a Judge and Clerk of election, a Justice of the Peace, an Assessor, and a Director of the public school district in which he lives. That Omaha Indians have taken part in the State and County

government, extending over the reservation, and have held the following offices in said county of Thurston, State of Nebraska: County Coroner, County Attorney, County Judge, Justice of the Peace, Constable, Road Overseer, Election Officers, and have also served as jurors in the county and district Courts. Defendant is self-supporting, as are most of said Indians. Some of them are engaged in business and most of them engaged in farming.

Other Determinations Regarding the Disputed Territory.

122. In 1889, the Nebraska Legislature enacted legislation defining the geographical boundaries of Thurston County now codified as Neb. Rev. Stat. § 22-187. By 1922, the legislature had changed the boundaries of Thurston County as reflected below. New language as of 1922 is highlighted in bold font and excluded 1889 language is stricken through:

> **The territory bounded as follows shall constitute the county of Thurston:** Commencing at **a point where the west boundary of the Omaha Indian reservation intersects the south line of section thirty-three (33),** ~~the southeast corner of section thirty four (34)~~, township twenty-five, (25), north, of range five, **(5)** east, ~~sixth P.M.~~ **6th principal meridian**; thence east to the northeast corner of township twenty-four, (24), north, of range seven (7)~~,~~ east ~~sixth P.M~~; thence south to the south line of the Omaha

Indian reservation~~,~~ as originally surveyed; thence east along said line to the **line between sections thirty-two and thirty-three**, ~~southwest corner of section twenty eight (28)~~, township twenty-four (24)~~,~~ north, of range ten (10)~~,~~ east ~~sixth P.M.~~; thence north to the northwest corner of section twenty-one (21), township twenty-four, (24) north, of range ten (10) east ~~sixth P.M.~~; thence east to the eastern boundary of the State of Nebraska; thence in a northwesterly direction along said boundary line to its intersection with the section **north** line **of the Winnebago Indian reservation**, ~~dividing sections twenty five (25) and thirty six (36),~~ township twenty-seven (27)~~,~~ north, of range nine, (9)~~,~~ east ~~sixth P.M.~~; thence west **along the north line of said reservation to the intersection of the line between sections thirty-three and** ~~to the northwest corner section~~ thirty-four ~~(34)~~, township twenty-seven (27)~~,~~ north, range six (6)~~,~~ east sixth ~~P.M~~; thence south to the southwest corner of section thirty-four**,** (34)~~,~~ township twenty-seven, (27)~~,~~ north, range six (6)~~,~~ east ~~sixth P.M.~~; thence west to **an intersection with the west boundary of said Winnebago Indian reservation**; ~~the northwest corner of section two (2), township twenty-six (26), north, of range five (5), east sixth principal meridian;~~ thence south **along the Winnebago and Omaha Indian reservation line** to the place of beginning.

Compare Compiled Statutes of Nebraska 1889, chapter 17, § 75b with Compiled Statutes of Nebraska 1922, chapter 13, § 804.

123. In November 1961, the Winnebago Agency issued a "Historical Summary for Omaha Reservation" which stated that boundaries of the Omaha Reservation had been delineated in the original survey of 1855, and were only diminished by two sales of land to the United States for the benefit of the Winnebagos.

124. According to the "Summary," these "two statutory cessions . . . are the only changes effected in the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them."

125. On April 16, 1969, the legislature on behalf of the State of Nebraska voted to retrocede to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, except for offenses involving operation of motor vehicles on public roads or highways.

126. The United States government, through the Secretary of the Interior, accepted the retrocession of jurisdiction on October 16, 1970. See 35 Fed. Reg. 16598 (1970).

127. The legal description of the land in the Notice of Acceptance of Retrocession of Jurisdiction delineates the Omaha Indian Reservation as originally surveyed.

128. From 2007 until sometime immediately prior to expert depositions in this case (August 7-8, 2012), the Thurston County website declared that:

> The two reservations [the Omaha Indian and Winnebago] are still in existence today and cover the entire Thurston County area.

129. In 1989, the Office of the Solicitor of the United States Department of the Interior was asked by the Bureau of Indian Affairs to locate the western boundary of the Omaha Indian Reservation.

130. The Department of Interior reviewed "each of the treaties or legislative acts effecting [sic] the reservation" boundary and stated that the land west of the railroad right of way "appears to have lost its Indian character long ago with the arrival of non-Indian homesteaders."

131. The Department of Interior concluded "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way . . . [U]nder the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for settlement."

132. The 1989 Department of the Interior opinion incorrectly stated that no "Indian trust allotments

were made on lands lying west of the Sioux City and Nebraska Railroad right-of-way."

133. The allotment map shows that there were at least 10-15 allotments taken by Omaha Tribe members which were either wholly or partially west of the railroad right of way following the passage of the 1882 Act.

134. The 1989 Department of the Interior opinion was officially withdrawn on April 16, 2012, by Patrice H. Kunesh, Deputy Solicitor for Indian Affairs in the United States' Solicitor's Office in Washington, in a letter to Priscilla Wilfahrt, Twin Cities Field Solicitor.

135. On April 16, 2012, Patrice H. Kunesh, Deputy Solicitor for Indian Affairs in the United States Solicitor's Office, sent a letter to Priscilla Wilfahrt, Twin Cities Field Solicitor stating, "I have reviewed your letter of April 24, 2008, to the Great Plains Regional Director of the BIA, which concludes that the boundaries of the Omaha Indian Reservation have not been diminished. The April 24, 2008, letter supersedes your Office's letter of June 27, 1989 [the Kimball Opinion], to the Great Plains Regional Director regarding 'Survey of Western Boundary of Omaha Reservation.' The June 27, 1989 letter [the Kimball Opinion] is hereby withdrawn and not to be relied upon."

136. The Department of the Interior, the Office of the Solicitor in Washington, D.C., the Field Solicitor's Office in Minnesota, and the Winnebago Agency in

Nebraska have been instructed to rely upon the April 24, 2008, Wilfahrt Letter.

137. On August 22, 2000, the Thurston County District Court determined that the land west of the railroad right of way is not a part of the Omaha Reservation. On February 15, 2007, the Nebraska Attorney General issued an opinion which also concluded that the land west of the railroad right of way was not a part of the Omaha Reservation.

Treatment of the Disputed Territory by the Tribe

138. Tribal authorities enforce Title 7 of the Omaha Tribal Code related to fire protection east of the right of way, but not west of the right of way.

139. Tribal authorities enforce Title 9 of the Omaha Tribal Code related to animal control east of the right of way, but not west of the right of way.

140. Tribal authorities enforce Title 14 of the Omaha Tribal Code related to fireworks east of the right of way, but not west of the right of way.

141. Tribal authorities enforce Title 15 of the Omaha Tribal Code related to wildlife and parks east of the right of way, but not west of the right of way.

142. Tribal authorities enforce Title 35 of the Omaha Tribal Code related to business permits east of the right of way, but not west of the right of way.

143. Tribal authorities enforce Title 36 of the Omaha Tribal Code related to business licenses east of the right of way, but not west of the right of way.

144. The Omaha Tribe does not offer foster care, medical, welfare or child protective services west of the right-of-way.

145. The Omaha Tribe does not have an office and does not operate a school, industry or business west of the right-of-way.

146. No tribal celebrations or ceremonies take place west of the right-of-way.

147. The Omaha Tribe does not conduct governmental or ceremonial activities west of the right of way and has no mineral rights or other claims to land west of the right-of-way.

Other Activity Related to the Omaha Reservation Boundaries

148. On March 6, 1992, the Nebraska State Tax Commissioner issued a Revenue Ruling stating that the Village of Pender, among others, is located within the boundaries of the Omaha Indian Reservation.

149. In 2002 and 2003, the Omaha Tribe contacted the Nebraska Department of Roads (NDOR) requesting replacement of signs delineating the location of the boundaries of the Omaha Indian Reservation. The signs had been removed at the direction of State

officials due to a dispute over the location of the western boundary of the Omaha Indian Reservation.

150. Beginning on October 1, 2005, the Omaha Tribe and the State of Nebraska entered into an Agreement for the Collection and Dissemination of Motor Fuel Taxes between those parties on sales of motor fuel made on the Omaha Reservation.

151. Former Omaha Tribal attorney, Maurice Johnson, testified regarding various efforts made by the Omaha Tribe throughout his tenure as counsel relating to its presence in the western region of the Omaha Tribe of Nebraska Reservation and, in particular, near or within the Village of Pender.

152. Mr. Johnson testified that in his opinion, for the most part, the Tribe's efforts were met with anger and hostility and at least once instance of overt racism.

153. For example, in approximately 2003, the Tribe received a federal grant relating to roads. A requirement of the grant was the exercise of traffic safety checks in order to determine whether people were wearing seatbelts. There was opposition from the Pender community and, specifically, the Pender police, who challenged the Tribe's authority to administer the safety checks.

154. In 2003, Mark Casey, the Highway Superintendent of the Thurston County Road Department contacted the Nebraska Department of Roads and

requested that the state road map of Nebraska be redrawn.

155. Casey stated that "the latest BIA maps that are in my possession show the original boundary of the Reservation and include a notation 'Omaha Treaty Boundary of March 10, 1854.'"

156. Casey requested that the boundary be changed "particularly in the area around Pender" due to a "District Court decision [State v. Picotte] of August 22, 2000, Case No. CR 00-6. . . ."

157. Although all orders entered in State v. Picotte by the District Court of Thurston County, with no involvement by the Omaha Tribe, have no legal impact on the Omaha Reservation, State cartographers again redrew the western borders of the reservation, creating an altered map that moved the western boundary of the Omaha Reservation to a new location just east of Pender. The State cartographers then extended the reservation's western boundary to the junction of State Highways 94 and 9 (north of Pender) with State Highway 9 as the western border of the reservation until this highway passed into the Winnebago Reservation.

158. This new delineation of reservation boundaries placed the Village of Pender outside of the reservation's borders.

159. Also, in or around the summer of 2007, officials from the Environmental Protection Agency, Region 7 in Kansas City ("EPA"), visited Pender to publicly

discuss the Omaha Tribe administering federal regulations on pesticide and fungicide control on the Omaha Tribe reservation, including Pender. The meeting, which was of a "town hall" variety, was very heated. Two statements made by persons in opposition to the EPA's involvement were anti-Native American, such as "We're not going to have Indians telling us how to farm," and "How about if I change my name to 'Spotted Eagle,' can I then tell white people how to farm their land?"

160. In 2007, Ms. Teri Lamplot, while she was Chair of the County Board of Supervisors for Thurston County, asked the U.S. Census Bureau to revise the boundaries of the Omaha Indian Reservation to place Pender outside of the Omaha Indian Reservation.

161. In response to Ms. Lamplot, Robert LaMacchia, the Chief of the Geography Division of the U.S. Census Bureau informed Ms. Lamplot that the Census Bureau was "unable to make the changes to our database" and would continue to rely upon the 1999 BIA map which indicated that Pender fell within the western boundary of the Omaha Indian reservation and stated "While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no new legal opinion, federal court decision, Act of Congress, etc., has altered these boundaries."

162. Finally, efforts were made to cross-deputize police officers among the Tribe, Thurston County Sheriff, and the Nebraska State Patrol to facilitate

law enforcement on the reservation by defining policing relationships, delineating powers, and encouraging cooperation. Thurston County refused to join any cross-deputization efforts, despite the willingness of the Nebraska State Patrol to participate in such an agreement.

163. Although cross-deputization did occur with the State Highway Patrol and with the Walthill Police Department, Thurston County did not participate.

164. In approximately October of 2011, Tribal member Thomas Saunsoci was arrested and charged with a probation violation in the County Court of Thurston County, Nebraska.

165. Mr. Saunsoci was held in custody in the Thurston County jail in Pender with the condition that he could not be released until he paid a bond.

166. A close personal friend of Mr. Saunsoci came to the Thurston County jail in Pender with a sufficient amount of money to bail him out.

167. The jailer said that she/Thurston County could not accept the money without Mr. Saunsoci's signature appearing on a document called a "Waiver of Extradition."

Factual Issues Raised with the Court by Teleconference on June 8, 2013.

The Omaha Tribe presented the following statements to the Tribal Court as undisputed material

facts which Defendants claim were not controverted by Plaintiffs; argument about the effect of Plaintiffs' failure to controvert the following will be submitted and argued in the summary judgment briefs to this Court:

1. The 1882 Act was different from the 1854 Treaty cession of Omaha lands and different from the 1865 Treaty cession and sale of lands by the Omaha Indians to the federal government for use as a reservation for the Winnebagos.

2. Specifically, the 1882 Act, which allowed reservation land to be sold to white settlers, did not use certain language found in the 1854 and 1865 Treaties, to-wit:

- "forever relinquish all right and title"
- "In consideration of and payment for the country herein ceded, and the relinquishments herein made"
- "cede, sell, and convey to the United States a tract of land from . their present reservation"
- "vacate and give possession of the lands ceded [by this treaty] immediately after its ratification."

3. The 1882 Act did not provide for the total surrender of all tribal rights on the opened lands.

4. The 1882 Act did not require that the Omaha tribal members vacate any part of the reservation.

5. The 1882 Act did not provide for a relinquishment of title to the land in exchange for a specific sum of money, as did the 1854 and 1865 Treaties.

6. The 1882 Act did not restore the opened lands to the public domain.

7. The 1882 Act did not prohibit access by the Omaha Tribe to the opened lands following its passage.

8. At all time pertinent to the issues before this Court, Indian allotments, by definition, could only be granted upon reservation land.

9. Additionally, the Kimball Opinion erroneously concluded that an earlier Act unsuccessfully attempting to sell part of the reservation constituted a "de facto diminishment."

10. In 2009, the EPA brought an administrative enforcement action against Krusemark Ag, Inc. for the assessment of civil penalties pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 and related federal regulations (the "EPA Action").

11. On December 1, 2009, the EPA entered into and filed a Consent Agreement and Final Order with respect to the EPA Action.

12. Krusemark Ag, Inc. is located at 58395 849th Road, Pender, Nebraska 68047 and is a pesticides producing establishment (the "Krusemark Ag Facility"). The Krusemark Ag Facility is situated and

operates west of the abandoned Sioux City and Nebraska Railroad right of way.

13. In December 2007, the EPA published a Fact Sheet in which the EPA indicated its intent to issue final National Pollutant Discharge Elimination System (NPDES) permits to the concentrated animal feeding operations (CAFO) of Bruns Feedlot, LLC.

14. Bruns Feedlot, LLC is located at 1172 I Ave Pender, Nebraska 68047. Bruns Feedlot, LLC is situated and operates west of the abandoned Sioux City and Nebraska Railroad right of way

15. If the foregoing properties were considered to be outside the boundaries of the Omaha Indian Reservation, the EPA would not be involved; rather, the Nebraska Department of Environmental Quality would have exerted jurisdiction.

16. Although not artfully drawn, the "Waiver of Extradition," is tacit acknowledgment by Thurston County that venue for Mr. Saunsoci's violation was properly in the Omaha Tribal Court.

Maps

The following statements of fact asserted by the Omaha Tribe relating to certain maps which Defendants contend were not controverted by the Plaintiffs. However, counsel agreed to review the maps in question to be sure all legends, etc. appearing thereon are legible and will submit same to the Court

in conjunction with their summary judgment briefing:

1. On January 31, 1884, eighteen months after the passage of the 1882 Land Act, federal cartographers working for the BIA drafted a map indicating that boundaries of the reservation remained the same: lands to the west of the railroad right of way remained part of the reservation.

2. A survey of state highway maps in the archives of the Nebraska Department of Roads in Lincoln indicates that the archives possess Nebraska highway maps dating from 1949.

3. Between 1949 and 1972, these maps do not indicate the location of either the Omaha or Winnebago reservations.

4. In 1999, the Area Director of the Aberdeen Agency reported that "The western boundary of the Omaha Reservation is as depicted on the map titled 'OMAHA RESERVATION, as of August 08, 1996, issued by USDI-BIA ABERDEEN AREA GIS, of March 28, 1999."

5. In 1999, the BIA produced a map that depicted the western boundary of the Omaha Reservation as that border delineated in 1855, and that boundary

was also used by the United States Department of Commerce in conducting the 2000 Census.

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs.

BY: HUSCH BLACKWELL LLP
Gene Summerlin – 19611
Mark Hill – 24903
610 J Street, Suite 200
Lincoln, NE 68508
(402) 434-8040
gene.summerlin@
huschblackwell.com
mark.hill@
huschblackwell.com

BY: /s/ Gene Summerlin

and

MITCH PARKER, In his official capacity as Member of the Omaha Tribal Council, BARRY WEBSTER, In his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, In his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, In his official capacity as Secretary

of the Omaha Tribal Council, TIM GRANT, In his official capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member of the Omaha Tribal Council, and ANSLEY GRIFFIN, In his official capacity as Chairman of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control, Defendants.

BY: STINSON MORRISON HECKER LLP
Patricia Zieg – 14662
Nora Kane – 21562
1299 Farnam St.
Omaha, NE 68102
(402) 342-1700
pzieg@stinson.com
nkane@stinson.com

BY: /s/ Nora Kane

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of June, 2013, this Joint Stipulation was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all CM/ECF Participants.

/s/ Gene Summerlin

Attachment 1

FORTY-SEVENTH CONGRESS.
SESS. I. CH. 434. 1882.

CHAP. 434. – An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler,

occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents

per acre: *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company,

under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for the

minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said

State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which

proviso shall be incorporated in the patent issued to the tribe: Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, August 7, 1882.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT B

(Filed Jun. 14, 2013)

United States Department of the Interior

[SEAL] OFFICE OF THE SOLICITOR
1849 C STREET N.W., MS-6554
WASHINGTON, DC 20240

SEP 05 2012

Memorandum

TO: Priscilla Wilfahrt, Twin Cities Field Solicitor

FROM: Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs
[/s/ Michael J. Berrigan]

SUBJECT: Omaha Reservation Boundary

You requested this office's review[1] of the June 27, 1989 letter from the Twin Cities Field Solicitor's Office to Jerry Yeager, then-Area Director for the Great Plains Region of the Bureau of Indian Affairs (1989 Opinion),[2] in which the Twin Cities Field Office evaluated whether the western boundary of the Omaha Tribe of Nebraska's (Omaha Tribe or Tribe) Reservation had been diminished, as well as the April 24, 2008 letter from the same office to Alice Harwood, then-Acting Regional Director for the Great Plains

---

[1] The Division of Indian Affairs is the lead office within the Office of the Solicitor that addresses Indian law matters. *See* Interior Department Manual, 110 DM2 2.2(E)(3).

[2] Attached as Exhibit A.

Region (2008 Opinion),[3] in which the Twin Cities Field Office questioned the 1989 Opinion and the conclusions it reached.

This issue currently is in litigation in the Omaha Tribal Court.[4] The Department of the Interior (Interior) is concerned about the uncertain status of the western boundary of the Omaha Reservation and is considering whether to file an *amicus curiae* brief in this litigation.

In connection with the Tribal Court litigation, both the Tribe and plaintiffs have retained expert historians who prepared reports about the history of the Omaha Tribe and its Reservation. Plaintiffs' expert concluded that the 1882 Act diminished the Omaha Reservation, primarily relying on demographics; specifically, on the fact that a relatively small number of Tribal members selected allotments in the western portion of the Reservation and that non-Indians comprise the majority population in that area.[5] The Tribe's expert concluded that the 1882 Act did not diminish the Omaha Reservation, primarily relying on the language of the 1882 Act, subsequent references to the Reservation made by Congress, as well

---

[3] Attached as Exhibit B.

[4] *See Village of Parker v. Pender*, No. 08-002 (Omaha Tribal Court).

[5] *See* Plaintiffs' Expert Report (attached as Exhibit C); Plaintiffs' Expert Rebuttal (attached as Exhibit D).

as the contemporaneous understanding of Omaha tribal members.[6]

After reviewing the 1989 Opinion, the 2008 Opinion, the Tribe's and Plaintiffs' expert reports, and after conducting our own research, we conclude that the analysis in the 2008 Opinion is correct and is incorporated herein by reference. Below we supplement the 2008 Opinion by restating the Supreme Court jurisprudence concerning reservation diminishment; discussing the history of the Omaha Tribe and its Reservation; analyzing legislation enacted in 1872 and 1882; and determining that neither act diminished the Tribe's Reservation.

I. Supreme Court Jurisprudence on Reservation Diminishment

The Supreme Court has established a "fairly clean and analytical structure" for determining whether a particular congressional act diminished a reservation.[7] The Court has established several governing principles that guide this analysis. At the outset, "only Congress can divest a reservation of its land

---

[6] *See* Tribe's Expert Report (attached as Exhibit E); Tribe's Expert Rebuttal (attached as Exhibit F).

[7] *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962).

and diminish its boundaries."[8] "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."[9]

Moreover, "there is a presumption in favor of the continued existence of a reservation," which requires that any contrary intent of Congress "must be clearly expressed."[10] Diminishment "will not be lightly inferred" and "requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found."[11] Indeed, congressional intent to diminish a reservation must be "clear and plain."[12] Any ambiguities in a statute are resolved in favor of the Indians.[13]

---

[8] *Solem*, 465 U.S. at 470.

[9] *Id.* (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).

[10] *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 991 (8th Cir. 2010) (citing *Osage Nation v. Irby*, 597 F.3d 1117, 1121 (10th Cir. 2010) *cert. denied*, 131 S. Ct. 3056 (2011). *See also Yankton*, 522 U.S. at 343; *Solem*, 465 U.S. at 472.

[11] *Solem*, 465 U.S. at 470 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)).

[12] *Yankton*, 522 U.S. at 343 (1998) (citing *United States v. Dion*, 476 U.S. 734, 738-39 (1986)). *See also Solem*, 465 U.S. at 470 (intent to diminish must be "clearly evince[d]"); *DeCoteau*, 420 U.S. at 444 (intent to disestablish must be "clear").

[13] *Yankton*, 522 U.S. at 344 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)).

The seminal Supreme Court decision *Solem v. Bartlett* and its progeny have established a three-prong test for analyzing whether a given statute diminished and altered a reservation's boundaries or simply offered non-Indians the opportunity to purchase land within the reservation.[14] The most probative evidence of congressional intent is the language of the statute itself.[15] Next, courts will look at the circumstances surrounding the passage of the act.[16] Third, but of less importance, courts may look to events that occurred after the passage of the act "to decipher Congress's intentions."[17]

The analysis begins with the statutory language. Although the Supreme Court has never required a particular form of words,[18] where there is explicit reference to a cession or total surrender of all tribal interests in the land coupled with an unconditional commitment from Congress to pay the tribe a sum certain amount for its land, there is an "almost insurmountable presumption" that Congress intended to diminish the reservation.[19]

For example, in *DeCoteau*, the Supreme Court found that statutory language to "cede, sell, relinquish and

---

[14] *Solem*, 465 U.S. at 470.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 471.

[18] *Hagen*, 510 U.S. at 411.

[19] *Solem*, 465 U.S. at 470-71.

convey" in exchange for a sum certain payment, in light of the surrounding circumstances and legislative history, terminated the boundaries of the Lake Traverse Reservation.[20] In contrast, in *Seymour*, the Court found that language that simply authorized the Secretary of the Interior "to sell or dispose of" unallotted lands with the proceeds from the sale of those lands to be distributed to the tribe was deemed insufficient to completely divest the tribal interest, and thus did not diminish the Colville Reservation boundary.[21]

Even when a statute contains cession language coupled with sum certain compensation, courts will look to the legislative history and surrounding circumstances to confirm congressional intent.[22] The Court has expressly "decline[d] to abandon [its] traditional approach to diminishment cases, which requires [an examination of] all the circumstances surrounding the opening of a reservation."[23] The reasons are deeply rooted in history. As explained in *South Dakota v. Yankton Sioux Tribe*, "at the turn of this century, Congress did not view the distinction

---

[20] 420 U.S. 425 at 427.

[21] *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357 (1962). *See also Mattz v. Arnett*, 412 U.S. 481, 499 (1973) (reservation not terminated by discretionary allotment act that opened land within the Klamath River Indian Reservation for settlement).

[22] *DeCoteau*, 420 U.S. at 445.

[23] *Hagen*, 510 U.S. at 412.

between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because 'the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.'"[24] In addition, "Congress then assumed that the reservation system would fade over time."[25] "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."[26] Courts therefore will also consider surrounding circumstances to determine congressional intent on a case-by-case basis.

Indeed, "congressional intent must be clear, to overcome the general rule that doubtful expressions are to be resolved in favor of . . . the wards of the nation, dependent upon its protection and good faith."[27] As summarized in *Solem*:

> When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed

---

[24] 522 U.S. 329, 343 (1998) (quoting *Solem*, 465 U.S. at 468).

[25] *Id.*

[26] *Id.*

[27] *DeCoteau*, 420 U.S. at 444.

> legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.[28]

Nevertheless, the Supreme Court has never been willing to extrapolate a specific congressional purpose to disestablish a reservation in a particular case based solely on the general expectations in the allotment era.[29]

Lastly, but to a lesser extent, the Court looks to events that occurred after the passage of the act to determine congressional intent.[30] As part of this prong, the Court will look to subsequent demographics on a more "pragmatic level."[31] "Where non-Indian settlers flooded into the open portion of the reservation and the area has long-since lost its Indian character," the Court has acknowledged that diminishment may have occurred.[32] In some cases, the Court has stated it may look to events occurring after the passage of the act to decipher congressional

---

[28] 465 U.S. at 471.

[29] *Id.* at 468; *Mattz*, 412 U.S. at 499 (rejecting general congressional hostility to the reservation system as supporting termination of boundaries).

[30] *Solem*, 465 U.S. at 471.

[31] *Id.*

[32] *Id.*

intent.[33] The Court cautioned, however, that "[r]esort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation."[34] Moreover, the Court stated:

> [t]here are . . . limits to how far we will go to decipher Congress' intent in any surplus land Act. When both the Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.[35]

These subsequent events therefore are considered to be of secondary importance and the least persuasive prong of the *Solem* test.

II. Historical Background of the Omaha Tribe and Reservation

The Omaha Tribe and its ancestors have long occupied lands in the Missouri River Valley, primarily in the area of present-day eastern Nebraska.[36] Under

---

[33] *Id.*

[34] *Id.* at n.13.

[35] *Id.* at 472 (citing *Mattz*, 412 U.S. at 505; *Seymour*, 368 U.S. at 351).

[36] Tribe's Expert Report at 1.

the leadership of Chief Blackbird during the second half of the 18th Century, the Tribe controlled trading on the Missouri River with other Indian tribes and European settlers.[37] Chief Blackbird contracted smallpox in 1800, which then spread throughout the Omaha Tribe, killing hundreds of the Tribe's members.[38] Disease, as well as warfare with neighboring Indian tribes, decimated the Tribe's numbers as well as its power in the region.[39] "In response to their declining position, the Omahas sought closer ties with the United States."[40] To that end, the Omaha Tribe entered into several treaties with the United States.

A. Treaty Period: 1815-1865

i. 1815 and 1825 Treaties

In 1815, the Omaha Tribe and the United States entered into a Treaty of Peace and Friendship, forgiving each other for prior hostilities and providing that the Omaha Tribe was "under the protection of the United States, and of no other nation, power, or sovereign, whatsoever."[41] The Omaha Tribe and the

---

[37] *Id.* at 2.

[38] *Id.* at 2-3.

[39] *Id.* at 3.

[40] *Id.*

[41] Treaty of Peace and Friendship with the Mahas, 7 Stat 129 (1815).

United States entered into a second treaty in 1825.[42] The 1825 Treaty provided that the United States would regulate all trade and intercourse between the Omaha Tribe and other parties,[43] and also provided that the Tribe and the United States would work together to punish crimes committed by, or against, the Tribe's members.[44] Neither of these Treaties involved the sale, cession, or relinquishment of Omaha lands.

ii. 1830 Treaty

The Omaha Tribe entered into a third treaty with the United States in 1830, in which it agreed to "cede and relinquish to the United States forever all their right and title to lands" located east of the Missouri River near present-day Iowa.[45] In exchange for this land cession, the United States paid the Omaha Tribe $2,500 annually for ten years, as well as providing the Tribe other goods and services.[46]

iii. 1854 Treaty

With the payments owed to the Omaha Tribe under the 1830 Treaty coming to an end, the Tribe found

---

[42] Treaty with the Maha Tribe, 7 Stat. 282 (1825).

[43] *Id.* at art. 4.

[44] *Id.* at art. 5.

[45] Treaty with the Sacs and Foxes, et al., 7 Stat. 328 (1830). *See also* Tribe's Expert Report at 5-6.

[46] 1830 Treaty at art. 4.

itself in an increasingly difficult state.[47] Shortages of food, attacks from neighboring Indian tribes, and a declining population led the Omaha Tribe to consider ceding more land in exchange for financial assistance from the United States.[48] In 1854, Indian Agent Thomas Gatewood negotiated a treaty in Nebraska with the Omaha Tribe.[49] In such negotiations, the Tribe agreed to cede its claim to all lands with the exception of a reservation that would be established within the Tribe's original territory.[50] In exchange, the Omaha Tribe would be paid $40,000 per year for thirty years, as well as receive other forms of assistance.[51] Agent Gatewood and a delegation of Tribal representatives then traveled to Washington, D.C. to finalize the Treaty, with instructions that the Tribal delegation could "slightly modify" the Treaty terms if necessary.[52]

When Gatewood and the Tribal delegation reached Washington, however, George Manypenny, then-Commissioner of Indian Affairs, rejected the terms as too generous.[53] The new terms of the 1854 Treaty provided that the Omaha Tribe cede "all their lands

---

[47] Tribe's Expert Report at 9-10.

[48] *Id.*

[49] *Id.* at 10.

[50] *Id.* at 10-11.

[51] *Id.* at 10.

[52] *Id.*

[53] *Id.* at 11.

west of the Missouri River, and, south of a line drawn due west from a point in the centre of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line."[54] The 1854 Treaty also contained a provision that if the land set aside for a reservation for the Tribe was unsuitable, the President could "set apart and assign to them, within or outside of the ceded country, a residence suited and acceptable to them" not to exceed three hundred thousand acres in size.[55] After the Tribal delegation returned from Washington, the Omaha Tribe did indeed reject the lands described by the 1854 Treaty and selected instead three hundred thousand acres running west from the Missouri River, bounded on the north by Omaha Creek and on the south by Woods Creek.[56] The United States accepted this selection and formally established the Omaha Reservation in 1855.[57]

---

[54] Treaty with the Omahas, art. 1, 10 Stat. 1043 (1854).

[55] *Id.*

[56] Tribe's Expert Report at 14.

[57] *Id.* at 15. *See also* Letter from Indian Agent George Hepner to Comm'r of Indian Affairs George Manypenny (Apr. 1, 1855) (discussing the Omaha Tribe's selection of different reservation lands); Letter from Secretary of the Interior Robert McClelland to Comm'r of Indian Affairs Manypenny (May 11, 1855) (approving such selection); Field Notes of the Boundary of the Omaha Indian Reservation (Jun. 27, 1855) (fixing the

(Continued on following page)

The 1854 Treaty provided less compensation to the Omaha Tribe than the amount negotiated with Agent Gatewood in Nebraska. The Treaty provided that "[i]n consideration of and payment for the country herein ceded, and the relinquishments herein made," the United States would compensate the Omaha Indians in successive installment payments: $40,000 per annum for three years; $30,000 per annum for the next ten years; $20,000 per annum for the next 15 years; and $10,000 per annum for the next 12 years.[58]

In summary, while the circumstances surrounding the negotiation of the 1854 Treaty suggest that the Omaha Tribe may not have given its full, informed consent to the terms of the Treaty as ratified, the 1854 Treaty nevertheless established the Omaha Reservation in Nebraska after the lands for such Reservation were selected by the Tribe.

iv. 1865 Treaty

For the purpose of establishing a reservation for the Winnebago Tribe, the Omaha Tribe agreed to "cede, sell, and convey to the United States a tract of land from the north side of their present reservation" described as "commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence

---

boundary of the Omaha Reservation) (together attached as Exhibit G).

[58] 1854 Treaty at art. 4.

south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the river to the place of beginning."[59] The Omaha Tribe was to "vacate and give possession of the lands ceded by this treaty immediately after its ratification."[60] In consideration of the cession, "the United states agreed to pay to the said Omaha tribe of Indians the sum of fifty thousand dollars . . . for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation."[61]

Further consideration for this land cession included an extension of the provisions of the 1854 Treaty providing payments for an additional ten years as well as the payment of damages.[62] The "remaining portion of their present reservation" was to be cultivated and improved for individual use and benefit by

---

[59] Treaty with the Omaha Indians, art. 1, 14 Stat. 667 (1865). *See also id.* at art. 5 (stating that the "object of the Government in purchasing the land [from the Omaha Tribe] . . . is for the purpose of locating the Winnebago tribe thereon" and that if this arrangement "prove[d] detrimental to the peace, quiet, and harmony of the whites as well as of the two tribes of Indians, then the Omahas shall have the privilege of repurchasing the land herein ceded upon the same terms they now sell").

[60] *Id.* at art. 1.

[61] *Id.* at art. 2.

[62] *Id.* at art. 3.

assigning to each head of a family up to 160 acres of land.[63] The 1865 Treaty further provided that the "whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation."[64] To assign parcels of land in severalty, the Commissioner of Indian Affairs would issue "certificates" to tribal members granting them and their heirs the "exclusive use and benefit" of such parcel.[65] Under the Treaty, such parcels could "not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe."[66] Following ratification of the 1865 Treaty, individual Omaha tribal members were assigned lots in severalty for the purpose of fostering permanent settlement and farming, and received certificates consistent with the 1865 Treaty.[67]

Each of the 1830, 1854, and 1865 Treaties with the Omaha Tribe used explicit cession language and sum certain amounts of compensation to establish the Omaha Reservation and negotiate the relinquishment of particular lands outside such Reservation.[68]

---

[63] *Id.* at art. 4.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Tribe's Expert Report at 19-21.

[68] *Solem* and its progeny arose in the context of evaluating whether statutes, not treaties, diminished Indian reservations. *See, e.g.*, *Solem*, 465 U.S. at 469 (evaluating whether a 1908 statute diminished the Cheyenne River Reservation); *Yankton*, 522 U.S. at 344 (evaluating whether an 1894 statute diminished

(Continued on following page)

Statutes enacted after 1865 for the Omaha Tribe's benefit do not include such language and, as discussed below, fail to evidence any intention of Congress to diminish the Tribe's Reservation.

B. Reservation Allotment and Land Sales

In the years following the ratification of the 1830, 1854, and 1865 Treaties, Congress enacted several statutes providing assistance to the Omaha Tribe. This office concurs with the 2008 Opinion's analysis regarding these statutes and agrees that none of them evidenced a congressional intent to diminish the Omaha Reservation.[69] We supplement the 2008 Opinion with a discussion of historical information pertaining to the period when Congress enacted these statutes.

i. Reservation Allotment under the 1865 Treaty

After the Omaha Reservation was established in 1855, Omaha tribal members primarily resided in the eastern section of the Reservation. This settlement

---

the Yankton Sioux Tribe's reservation); *Seymour*, 368 U.S. at 354-55 (evaluating whether a 1906 statute diminished the Colville Reservation) *Mattz*, 412 U.S. at 485 (evaluating whether an 1892 Act diminished the Klamath River Indian Reservation). The analysis of diminishment in the treaty context, in which an Indian tribe's understanding would likely play a more significant interpretive role, may be different than that used herein.

[69] *See* 2008 Opinion at pp. 5-15.

was due in large part to the Tribe's historical ties to the Missouri River and because the villages there offered tribal members protection from attacks from neighboring Indian tribes.[70] Tribal members continued to hunt bison in the western part of their Reservation, as well as outside the Reservation.[71] As the bison population waned in the late 19thCentury, however, some tribal members turned to farming as a means of subsistence survival.[72]

Some, but not all, Omaha tribal members supported the assignment of individual parcels of land within the Reservation under the 1865 Treaty.[73] Through such assignments, tribal members sought to protect their homes and farms.[74] Those that supported

---

[70] Tribe's Expert Report at 4-5. *See also* Plaintiffs' Expert Report at 4-5 (discussing the Tribe's ties to the Missouri River and its practice of engaging in bison hunting).

[71] Tribe's Expert Report at 15, 23 (discussing off-reservation hunting trips taken by Tribal members); *id.* at 21 (stating that Tribal members continued to hunt on the prairies west of Logan Creek (i.e., west of the railroad right of way) and considered the region to be an integral part of their reservation).

[72] *Id.* at 23.

[73] *Id.* at 58-59.

[74] *See* Annual Rep. of the Comm'r of Indian Affairs at XLVIII-L (1884); Tribe's Expert Report at 58-59 (stating that majority of Tribal members did not support the allotment of the Reservation following the 1882 Act, but fifteen of those who did selected allotments west of the railroad right of way totaling over 900 acres); Plaintiffs' Expert Report at 17-18 (stating that ten chose allotments west of the railroad right of way for a total of 876 acres).

assignments obtained certificates pursuant to the 1865 Treaty, that purportedly gave them the "exclusive use and benefit" of such land.[75] Tribal members soon learned that the certificates they obtained under the 1865 Treaty were of questionable legal value, and likely would not be enforceable in state or federal court.[76] This discovery, combined with the recent removal of the Ponca Tribe from Nebraska to Oklahoma, engendered grave concerns among tribal members that they, too, could be forcibly removed from their Reservation.[77] In response, some tribal members advocated for legislation that would provide them with "good title" to their assigned parcels as a way to protect against forced removal from their lands.[78] In addition, Omaha tribal members agreed to sell lands within the Reservation in order to raise money to buy supplies and equipment for their farm operations.[79]

---

[75] Treaty with the Omaha Indians, art. 4, 14 Stat. 667 (1865).

[76] Tribe's Expert Report at 26.

[77] *Id.* at 25; Plaintiffs' Expert Report at 12-13.

[78] Tribe's Expert Report at 25; H. Rep. No. 47-1530 (July 1, 1882) (House Report that included statements from dozens of Omaha members concerning their request for legislation that would ensure "good title" to their property while also providing a mechanism for raising funds to assist them).

[79] Tribe's Expert Report at 25; H. Rep. No. 47-1530.

ii. 1872 and 1882 Land Sale Acts

As discussed in Section III below, legislation enacted in 1872 (1872 Act)[80] resulted in the sale of a relatively small amount of land to non-Indians. Legislation enacted in 1882 (1882 Act),[81] however, succeeded as a mechanism to raise funds for Omaha tribal members. By 1887, nearly all of the land opened and made available for sale within the western part of the Reservation had been selected or sold.[82]

Plaintiffs' expert report pointed to the fact that as a result of these land sales, the majority of the population in the opened area was comprised of non-Indians.[83] Plaintiffs' expert included census data generated between 1900 and 1930, as well as between 1990 and 2000, to show that the majority of the population of the area was comprised of individuals who self-identified as non-Indian.[84] While in recent times the assertion of Tribal jurisdiction in the western portion of the Reservation has not been expansive, Plaintiffs' expert discussed significant actions taken by the Tribe in the western portion of the Reservation. For example, for a period of time the Tribe had "an agreement with the State of Nebraska

---

[80] 17 Stat. 391 (1872).

[81] 22 Stat. 341 (1882).

[82] Senate Ex. Doc. No. 77, 50th Cong., 1st Sess. (1888) (some non-Indian buyers had not paid for the land in full as of 1887).

[83] Plaintiff's Expert Report at 27.

[84] *Id.*

to collect fuel taxes west of the right of way."[85] Omaha tribal police officers have exercised public safety jurisdiction in Pender and the vicinity, including patrolling the area and establishing a safety checkpoint to police the activities of tribal members there.[86]

The Tribe's expert examined how Omaha tribal members lived, farmed, grazed cattle, and conducted business in the western portion of the Reservation in the decades following the enactment of the land sale statutes.[87] Tribal members also were active in the communities that developed in the western portion, including Pender.[88] Tribal members Thomas Sloan and Hiram Chase, who were both attorneys, "resided, practiced their professions, and maintained businesses within the village of Pender" during this period.[89] Sloan, Chase, and another tribal member, Simeon Hallowell, were elected to public office in both Pender and Thurston County and held a variety of positions, including mayor of Pender, county attorney, and county judge.[90]

Collectively, these expert reports show that the land sale statutes increased the population of the western section overall, but not in such a way that excluded

---

[85] *Id.* at 30.

[86] *Id.* at 29.

[87] Tribe's Expert Report at 64-65.

[88] *Id.*

[89] *Id.* at 65.

[90] *Id.*

Omaha tribal members from or forced them to vacate the area opened for sale. Indeed, Omaha tribal members were encouraged to select allotments in the western part of the Reservation, and they lived and were active in the political leadership of the communities that developed there.

III. Analysis

In the *Village of Pender v. Parker* litigation currently pending in the Omaha Tribal Court, plaintiffs assert that the 1882 Act diminished the Omaha Reservation. Plaintiffs' expert further asserts that while the 1872 Act did not diminish the Reservation, it can nevertheless be used as evidence that the 1882 Act did.[91] This contention lacks a legal basis because a statute enacted by a prior Congress that fails to evidence any congressional intent to diminish a reservation cannot be used as evidence of a later Congress's intent to diminish the same reservation. Accordingly, this office agrees with the conclusion reached in the 2008 Opinion that neither statute diminished the Omaha Reservation.

A. 1872 Act

i. Language of 1872 Act

In 1872, Congress enacted *An Act for the Relief of Certain Tribes of Indians in the Northern Superintendency* (1872 Act) to assist several Indian tribes,

[91] *See* Plaintiffs' Expert Rebuttal at 5.

including the Omaha Tribe.[92] The 1872 Act authorized a survey of a portion of the Omaha Reservation "not exceeding fifty thousand acres, to be taken from the western part thereof and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south."[93] After a survey and appraisal, the Secretary of the Interior was "authorized to offer the same for sale for cash in hand; and sealed proposals; duly invited by public advertisements."[94] No bids would be accepted for less than the appraised value or, at the very least, no less than one dollar and twenty-five cents per acre.[95] The proceeds from such sale were to be "placed to the credit of said Indians on the books of the Treasury of the United States, and bear interest at the rate of five per centum per annum, payable

---

[92] 17 Stat. 391 (1872).

[93] *Id.* at sec. 1. Notably, the language in the 1872 Act describing the land available for sale is markedly distinct from the language found in the 1882 Act. While the 1872 Act refers to lands west of a "line running along the section lines from north to south," the 1882 Act describes the opened area as "lying west of the right of way." This difference could be explained in part by the fact that in 1880, the Omaha Tribe and the Sioux City and Nebraska Railroad Company entered into an agreement whereby the Tribe granted the railroad company a right of way through the Reservation. While this agreement was not specifically authorized by Congress at the time, *see* 2008 Opinion at 13-14, the right of way nevertheless became a common means of demarcating the Omaha Reservation and identifying those lands opened for sale under the 1882 Act.

[94] *Id.*

[95] *Id.*

semi-annually" except for funds deemed "necessary to be expended for their immediate use in improving and fencing farms, building houses, purchasing implements of agriculture and livestock, and in establishing and supporting schools."[96]

The 1872 Act authorized the Secretary to survey and offer for sale lands that had not already been assigned to Omaha tribal members on the western part of the Tribe's Reservation pursuant to the 1865 Treaty. It does not, however, contain language signaling a diminishment. Instead, the language in the 1872 Act is similar to language the Supreme Court has held *not* to result in diminishment.[97]

In *Seymour*, the Supreme Court examined a statute enacted in 1906 authorizing the sale of unallotted lands on the Colville Reservation.[98] That statute contained no specific language requiring Colville tribal members to vacate the reservation or making the lands subject to sale part of the public domain.[99] The Court determined that instead of evidencing an intent to diminish, the 1906 statute's repeated reference to the Colville Reservation evidenced Congress's intent that the reservation would continue to exist following the statute's enactment.[100] Further support

---

[96] *Id.*

[97] *Seymour*, 368 U.S. at 355.

[98] *Id.* at 354-55. *See also* 34 Stat 80 (1906).

[99] *Seymour*, 368 U.S. at 354-55.

[100] *Id.* at 355.

was found in the requirement that proceeds from land sales made under the 1906 statute be "deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington."[101] From this, the Court concluded that the 1906 statute "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."[102]

Like the 1906 statute at issue in *Seymour*, the 1872 Act opened a part of the Omaha Reservation for sale, but contained no explicit language of land cession.[103] The 1872 Act provided that after a survey and appraisal of the land, the Secretary was "authorized to offer the same for sale for cash in hand; and sealed proposals."[104] No sum certain amount was given; instead, the 1872 Act provided that no bids would be accepted for "less than the appraised value of [the] tract," but in any event no "less than one dollar and twenty-five cents per acre."[105] As in *Seymour*, the proceeds from the sale of Omaha Reservation lands

---

[101] *Id.* at 355-56.

[102] *Id.* at 356.

[103] *See* 17 Stat. 391 (1872).

[104] *Id.* at sec. 1.

[105] *Id.*

were to be "placed to the credit of said Indians on the books of the Treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually" except for funds deemed "necessary to be expended for their immediate use in improving and fencing farms, building houses, purchasing implements of agriculture and live stock, and in establishing and supporting schools."[106] And consistent with the jurisprudence of both *Solem* and *Seymour*, the language of the 1872 Act demonstrates that Congress contemplated that Omaha tribal members would remain in the area opened for sale to take advantage of the improvements they had made to the land there.

Instead of demonstrating any intent to diminish the Omaha Reservation, the 1872 Act simply evidences Congress's plan to sell land to raise funds for the support and benefit of the Omaha Tribe. The 1872 Act provided that the Secretary would act as the land agent to perfect the sale of certain lands within the Reservation. The 1872 Act expressly acknowledged Omaha tribal members' right to the western portion of their Reservation, did not require them to vacate that area, and did not address the disposition of unsold land. This is consistent with a finding of congressional intent to continue, not diminish, reservation status.

---

[106] *Id.*

Congress clearly knew how to demonstrate its intention to diminish the Omaha Reservation, as it did so using explicit language of land cession and sum certain compensation in the 1830, 1854 and 1865 Treaties. In contrast, the 1872 Act lacks any such cession language or a sum certain amount of compensation. Moreover, the federal government acted as an agent for the survey and sale of the opened areas, and used the sale proceeds for the benefit of the Omaha Tribe. Importantly, Omaha tribal members expressly were permitted to continue to reside and make selection of lands in the opened area. For these reasons, we conclude that the language of the 1872 Act fails to demonstrate that Congress intended to diminish the Omaha Reservation.

ii. Surrounding Circumstances

Inasmuch as the statutory language of the 1872 Act fails to demonstrate any congressional intent to diminish the Omaha Reservation, the circumstances surrounding the implementation of the statute also fail to demonstrate such intent. Advertisements at the time stated that the lands available for sale under the 1872 Act "comprise the western part of the reservation of the Omaha tribe of Indians in the State of Nebraska," signaling that the lands sold under the statute remained within the Reservation.[107] Out of the 50,000 acres made available by for sale under the

---

[107] Tribe's Expert Report at 22.

1872 Act, only two sales were made totaling 300.72 acres.[108]

The 1872 Act failed to achieve the goal of selling land within the Reservation to raise funds for the Tribe and prompted the passage of the 1882 Act. Indeed, the debates concerning the 1882 Act highlight the lawmakers' understanding that the lands made available for sale under the 1872 Act were part of the Omaha Reservation.[109]

Plaintiffs' expert also agrees that the 1872 Act itself did not diminish the Reservation.[110] The expert finds diminishment under the 1882 Act, however, through Interior's actions subsequent to the 1872 Act's enactment. Specifically, she derives from Interior's listing of the 50,000 acres as available for sale, apart from rest of the Reservation,[111] evidence of Congress's intent to diminish the Reservation under the 1882 Act. Rather than evidence of a diminishment, however, Interior's actions are indicative of federal policies and practices at the time of selling reservation lands for the support and benefit of Indian tribes.

How various Interior officials referred to the land made available for sale under the 1872 Act does not demonstrate that Congress intended to diminish the

---

[108] Plaintiffs' Expert Report at 10-11.

[109] *See* discussion at Section III(B)(ii)(1).

[110] Plaintiffs' Expert Rebuttal at 5.

[111] Plaintiffs' Expert Report at 24-26.

Reservation through the 1872 Act or a later enacted statute, and otherwise cannot overcome the absence of any statutory language evidencing congressional intent to diminish the Reservation. Therefore, despite assertions made by Plaintiffs' expert, the 1872 Act does not support the claim that Congress diminished the Omaha Reservation.

iii. Subsequent Treatment

As discussed above, in the years following the enactment of the 1872 Act, only 300.72 acres were sold out of the 50,000 acres made available for sale. A mere two sales demonstrates the failure of Congress's plan to open a part of the Reservation for sale to support the Omaha Tribe under the 1872 Act. It also explains why Congress enacted the 1882 Act ten years later. For these reasons, the small, incremental demographic changes after the 1872 Act do not reflect congressional intent to diminish the Reservation through the statute.

In summary, the lack of language in the 1872 Act to "cede, sell, relinquish and convey" in exchange for a sum certain payment, and the failed land sales following its passage, unambiguously demonstrate to us that the 1872 Act did not diminish the Omaha Reservation.

B. 1882 Act

i. Language of 1882 Act

Ten years after its failed attempt to sell lands within the Omaha Reservation to raise funds for the support of the Omaha Tribe, Congress enacted *An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska* (1882 Act).[112] Similar to the 1872 Act, the 1882 Act authorized the Secretary to survey and sell "all that portion of [the Omaha Tribe] reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the [1880 Agreement]."[113] After the survey and appraisal of the lands, the Secretary was authorized to "issue a proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe."[114] After the proclamation, any bona fide settler occupying the land could purchase the land, not to exceed 160 acres for each acquisition.[115]

No specific sum certain was guaranteed to the Omaha Tribe for such sales in the 1882 Act. Instead, it provided that "no portion of said land shall be sold at less than the appraised value, and in no case for less

---

[112] 22 Stat. 341 (1882).

[113] *Id.* at sec. 1. *See also supra* note 93.

[114] *Id.* at sec. 2.

[115] *Id.*

than two dollars and fifty cents per acre."[116] The Act further provided that "all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act."[117] The proceeds of the sales were to be "placed on the credit of said Indians in the Treasury of the United States, and shall bear interest."[118]

After complying with all provisions in the 1882 Act, patents were to be "issued as in the case of public lands offered for settlement under the homestead and preemption acts."[119] This section, however, contained a provision stating that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act."[120] In other words, Congress intended that any land allotted to individual Omaha tribal members in the western portion of the Reservation pursuant to the 1865 Treaty would be unaffected by the 1882 Act.

The 1882 Act further provided for the allotment of the eastern portion of the Reservation.[121] Unallotted lands in this area were to be patented to the Omaha

---

[116] *Id.*

[117] *Id.*

[118] *Id.* at sec. 3.

[119] *Id.* at sec. 4.

[120] *Id.*

[121] *Id.* at sec. 5.

Tribe.[122] In addition, the 1882 Act provided that "said Indians or any part of them may, if they shall so elect, select the land which shall be allotted them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."[123]

The 1882 Act does not effect a diminishment of the Omaha Reservation for three reasons. First, the 1882 Act does not contain statutory language exhibiting a clear and unambiguous intent to diminish the Omaha Reservation. Instead it appears simply to provide for the sale of land, with the proceeds to be set aside for the benefit of the Tribe, much like the 1872 Act. Second, section four of the 1882 Act unequivocally states that any right in severalty acquired by an Indian under an existing treaty would not be affected by the 1882 Act. This section thus expressly leaves in effect the terms of the 1865 Treaty. Third, and quite significantly, the 1882 Act specifically authorized Omaha tribal members to select allotments "in any part of the reservation either *east or west of said right of way*."[124] These facts support the conclusion that Congress intended the land west of the right of way to remain as part of the Tribe's Reservation.

---

[122] *Id.* at sec. 8.

[123] *Id.*

[124] *Id.* at sec. 8 (emphasis added).

Like the 1872 Act, and the statute at issue in *Seymour*,[125] the 1882 Act did not result in reservation diminishment. In *Seymour*, the Supreme Court found significant the absence of express language requiring tribal members to vacate the land and making the lands in the opened area part of the public domain.[126] This deficiency, coupled with references to the continued status of the reservation, led the Court to conclude that Congress did not intend to diminish the reservation.[127] This conclusion is supported by the Supreme Court's more recent comments in *Yankton*:

> In both *Seymour* . . and *Mattz v. Arnett*,[128] . . we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus lands belonging to the Cheyenne River Sioux as language of cession. *See* 465 U.S. at 472. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.[129]

---

[125] 368 U.S. at 355.

[126] *Id.* at 354-55.

[127] *Id.* at 355.

[128] 412 U.S. at 501-502.

[129] *Yankton*, 522 U.S. at 345.

In the present matter, the language of the 1882 Act, similar to the statutory language at issue in *Seymour*, *Mattz*, and *Solem*, does not provide for a complete cession and relinquishment of land in exchange for payment of a "sum certain" amount that the Supreme Court would identify as demonstrating congressional intent to diminish the Reservation. Instead, the Secretary was directed to sell the opened land for no less than $2.50 per acre. The proceeds of those sales were to be placed in the United States Treasury for the benefit of the Omaha Tribe and bear interest annually at the rate of five per centum, providing annual income for the Omaha Indians. In *DeCoteau*,[130] the Supreme Court found that an act authorizing the Secretary to sell the land for no less than $2.50 per acre effected a diminishment. But that act also provided for the cession and relinquishment of all the tribe's "claim, right, title, and interest" in the lands made available for sale.[131] Congress did not include such additional language of cession and relinquishment in the 1882 Act.

The operation of the allotment provisions in the 1882 Act further evince Congress's intent to keep the existing Reservation intact for the use of tribal members. The 1882 Act authorized the Tribe's members to secure allotments on any part of the existing Reservation, including the portion of the Reservation west

---

[130] 420 U.S. at 443, 448.

[131] *Id.*

of the right of way. Thus, according to the plain language of the 1882 Act, Congress did not intend to diminish the western boundary of the Omaha Reservation.

ii. Surrounding Circumstances

The circumstances surrounding the 1882 Act's passage also fail to demonstrate a congressional intention to diminish the Omaha Reservation. We find that the legislative history of the 1882 Act and the contemporaneous understanding of Omaha tribal members and Interior officials tasked with implementing the statute together support the conclusion that Congress did not intend the 1882 Act to diminish the Omaha Reservation.

1. Legislative History

The 2008 Opinion addresses the legislative history surrounding the passage of the 1882 Act. As discussed at length in that Opinion, the tenor of the legislative history clearly demonstrates that Congress intended to honor its treaty obligations to the Omaha Tribe and sought to ensure that lands west of the railroad right of way would still be part of the Omaha Reservation following the enactment of the 1882 Act.

While Congress understood that the legislation authorized the sale of up to 50,000 acres in the western portion of the Reservation, it also carefully considered such legislation to ensure that the statute did

not alter the existing treaty obligations owed to the Omaha Tribe. For example, in support of language in the bill that protected existing treaty rights, Senator Dawes stated that "the Omaha Indians have the whole reservation and occupy it under an existing treaty."[132] Explaining why a provision requiring the removal of the Omaha Tribe from the area to be opened under the 1882 Act was deleted from the legislation, Senator Saunders of Nebraska stated that "[t]he Indians are not proposing to leave that part of the country and settle elsewhere. They have plenty of land left, and propose to remain there."[133] In response to a question concerning the ability of Omaha tribal members to buy parcels of land in the opened area, Senator Dawes explained that by selecting allotments in the opened area, "each individual Indian occupies to that extent the reservation, with all the treaty stipulations around him to protect and guard him."[134] These statements demonstrate that the lawmakers sought to find a way to make lands available for sale within the Omaha Reservation while not affecting the Tribe's rights and the United States' obligations concerning the entire Reservation under existing treaties.

---

[132] 1882 Cong. Rec. 3076, 3077-78 (Apr. 20, 1882) (statement of Senator Dawes). Senator Henry Dawes of Massachusetts sponsored the legislation that would become the General Allotment Act, 24 Stat. 388 (1887), also referred to as the "Dawes Allotment Act."

[133] 1882 Cong. Rec. 3027, 3028 (April 19, 1882).

[134] 1882 Cong. Rec at 3078.

In addition to respecting the United States' treaty obligations to the Omaha Tribe concerning its Reservation, the Congressmen considering the bill sought to ensure that existing and future Indian allotment selections in the opened area would be protected. For example, notwithstanding the fact that Interior's assertion at the time that no Omaha tribal members were residing in the area to be opened by the legislation,[135] Senator Dawes explicitly ensured that existing allotments in that area would not be affected by the 1882 Act.[136] Several Congressmen also made sure that the Act allowed tribal members to select allotments in the opened area, as tribal members were permitted to do under the 1865 Treaty.[137] In a colloquy concerning taxation, the suggestion was made that the allotments selected by tribal members be immediately subject to state and local taxation and not subject to any restrictions on alienation.[138] Senator Dawes expressly objected to this suggestion on the basis that

---

[135] 1882 Cong. Rec. at 3029 (reading into the record a letter from Interior stating that no Omaha tribal members were living on the western portion of the Reservation).

[136] *Id.* (stating that "it was thought wise to provide that if any Indian had located there he should be taken care of and not thrown out."). *See also* 1882 Act at sec. 4 (providing that "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act").

[137] *Id.* (statement of Senator Alison of Iowa); 1882 Cong. Rec. at 3077 (statement of Senator Beck of Kentucky); 1882 Cong. Rec. 6537, 6538 (July 26, 1882) (statement of Representative Haskell of Kansas).

[138] 1882 Cong. Rec. at 3028.

doing so would only serve to quickly divest tribal members of their lands.[139] Thus, such divestment was clearly not the intent of the legislation.

The legislative history of the 1882 Act demonstrates to us that Congress did not intend to diminish the Omaha Reservation. While some Congressmen advocated for language that would have divested the opened area of its trust status, such language was rejected and the 1882 Act, when enacted, included language demonstrating that Congress intended to protect existing treaty obligations owed to the Omaha Tribe and its members. Even if some statements in the legislative history may suggest a different reading, the Supreme Court jurisprudence instructs that Congress's intent to diminish must be "clear and plain" and will not be lightly inferred."[140]

Instead of "clearly evinc[ing] an intent . . to . . . change . . . boundaries"[141] when debating the 1882 Act, the legislators instead sought to respect treaty obligations owed to the Omaha Tribe and its members and to protect their claim to the entire Reservation. For these reasons, we conclude that the legislative history of the 1882 Act supports the conclusion that the Act did not diminish the Omaha Reservation.

---

[139] *Id.*

[140] *Solem*, 465 U.S. at 470.

[141] *Id.*

2. Contemporaneous Understanding of the Omaha Tribe and Interior Officials

Under *Solem*, a "widely-held, contemporaneous understanding" that legislation would diminish a reservation can be evidence of such congressional intent to achieve this result.[142] The historical record developed for the Omaha Tribe and its Reservation does not provide evidence demonstrable of such a "widely-held" understanding. As discussed in Section II above, certain Omaha tribal members supported legislation that would ensure they had "good title" to their lands and would provide a means of raising funding to help tribal members purchase farm equipment and other materials necessary for their subsistence survival. Tribal members also understood that they could select allotments in the western portion of the Reservation, consistent with the 1865 Treaty. They did not, however, understand that their Reservation would be diminished and no longer their territory.

The Secretary of the Interior issued instructions requiring that allotments west of the right of way were to be chosen quickly so that the remaining lands could be advertised for sale to non-Indians.[143] While the 1882 Act did not specifically require that allotments in the opened area be selected prior to sales to

---

[142] *Id.*

[143] Plaintiffs' Expert Report at 16.

non-Indians, Interior officials implemented the Act in this manner as a further means of identifying which lands in the opened area would be available for sale to non-Indians.[144] Soon after the passage of the 1882 Act, about two dozen tribal members selected allotments in the opened area, living on and cultivating between 876-935 acres.[145] Additionally, and as discussed in Section II above, tribal members were active in the communities that developed in the opened area, including Pender and Thurston County.[146]

The mutual understanding of both Omaha tribal members and Interior officials was that the western portion of the Reservation, while opened for settlement by non-Indians, remained part of the Omaha Reservation. This is shown most clearly by the fact that under the 1882 Act, tribal members could continue selecting allotments in the opened area, consistent with the 1865 Treaty.

3. Subsequent Treatment

a. Congressional and Departmental Actions

As discussed in the 2008 Opinion, Congress enacted several statutes after 1882 concerning the Omaha

---

[144] *Id.*

[145] *Id.* at 18; Tribe's Expert Report at 58.

[146] Tribe's Expert Report at 64-65.

Reservation. This office concurs with the analysis of these statutes in the 2008 Opinion, as none provide clear evidence of congressional intent to diminish the Reservation.

On February 10, 1888, in response to a Senate request seeking information about the sale of lands "*in* the Omaha Reservation," the Secretary of the Interior submitted a report concerning sales of Omaha lands made pursuant to the 1882 Act.[147] The Secretary was asked to provide details about the "amount of lands *upon* the Omaha Reservation [that] have been sold pursuant to the [1882 Act]."[148] The Secretary reported on both the amount of the land and the amount of the funds collected from those sales, stating that 49,630.59 acres, nearly all of the approximately 50,000 acres made available for sale, had been sold or committed to sale.[149] Under the terms of the 1882 Act, buyers paid for parcels in installments, and Congress extended the time for payment on several occasions.[150] The Secretary further stated that $154,654.62 had

---

[147] Senate Ex. Doc. No. 77, 50th Cong., 1st Sess. (1888), at 1 (emphasis added).

[148] *Id.* (emphasis added).

[149] *Id.* at 2.

[150] *See* 1882 Act at sec. 2; Act of August 2, 1886, 24 Stat. 214 (extending the time period by two years and requiring that interest be paid annually during the extension); Act of May 15, 1888, 25 Stat. 150; Act of August 11, 1894, 28 Stat. 276 (extending the time period further and requiring interest be paid annually during the extension).

been "paid into the Treasury" for the Tribe "with "$4,108.06 interest due and unpaid."[151]

As for the uncollected amounts that were due on parcels committed to sale, the Secretary noted that Congress had granted an extension of time to the land owners but that no steps had been taken to enforce payments due, or to recover payments for lands sold.[152] Present tense reference to the lands sold pursuant to the 1882 Act to be *in* or *upon* the Omaha Reservation in this correspondence demonstrates that in 1888, six years after the enactment of the 1882 Act, both Congress and Interior understood that Omaha Reservation had not been diminished by the 1882 Act.

In more recent years, the Bureau of Indian Affairs (BIA) has sought legal clarification regarding the western boundary of the Omaha Reservation. In 1989, the BIA requested a legal opinion concerning the location of the western boundary of the Reservation, and the Twin Cities Field Office issued the 1989 Opinion in response.[153] In 1991, the BIA Aberdeen Area Director requested another opinion, asking the Solicitor's Office to evaluate whether the lands comprising a railroad right of way reverted to the Omaha Tribe upon abandonment and whether the right of way formed the western boundary of the

---

[151] *Id.* at 2. *See also* Senate Ex. Doc. No. 77 at 2.

[152] *Id.*

[153] *See* discussion *infra* at Section IV.

Reservation.[154] Additionally, a map prepared by the BIA in 1964 included a notation that the 1882 Act had diminished the western boundary of the Omaha Reservation.[155]

In 1999, however, the BIA Aberdeen Area Director stated that the Omaha Reservation boundaries "have not been changed or altered since its establishment by the survey of 1855," except for the creation of the Winnebago Indian Reservation. The BIA statement cited to a map titled "Omaha Reservation of August 8, 1996," issued by USDI-BIA Aberdeen Area GIS on March 28, 1999.[156]

Both the Tribe's and Plaintiffs' experts have noted this inconsistent view of the Omaha Reservation boundary.[157] That the BIA was inconsistent, however, is of little persuasive effect. Nor should these various, and at times factually incorrect, statements be relied upon as authority for what Congress intended in 1882. That must be gleaned from the language of the Act itself and contemporaneous circumstances – none

---

[154] *See* Letter from Area Director, Aberdeen Area Office to Twin Cities Field Solicitor (Aug. 2, 1991) (attached as Exhibit H).

[155] *See* Map of the Omaha Indian Reservation created by the BIA Aberdeen Area (Oct. 8, 1964) (attached as Exhibit I).

[156] *See* Memorandum from Area Director, Aberdeen Area to Superintendent, Winnebago Agency (Aug. 13, 1999) (attached as Exhibit J).

[157] *See* Tribe's Expert Rebuttal at 21; Plaintiffs' Expert Report at 24-26; Plaintiffs' Expert Rebuttal at 21-22.

of which indicate a congressional intention to diminish the Omaha Reservation.

b. Demographics of the Opened Area

To a certain extent, courts have looked at the current demographics of an opened area to assess the "Indian character" of the land.[158] Demographics, however, are the least probative evidence of congressional intent and are given less consideration than the statutory language of the act and the surrounding circumstances.[159] "[A]s an unorthodox and potentially unreliable method of statutory interpretation," courts "limit[] how far [they] will go to decipher Congress' intention in any particular surplus land [a]ct" and demographics cannot overcome statutory language and surrounding circumstances that evidence no congressional intent to diminish.[160]

In the present matter, Omaha tribal members were permitted, even encouraged, to select allotments anywhere on the Reservation, including west of the right of way. Interior officials expedited the selection of allotments in the western portion so that land that was not selected for allotments could be advertised for sale to non-Indians. Despite this, Omaha tribal

---

[158] *Yankton*, 522 U.S. at 356 (1998) (quoting *Solem*, 465 U.S. at 468).

[159] *Solem*, 465 U.S. at 471-72.

[160] *Id.*

members historically resided close to the Missouri River east of the right of way, had made permanent homes and farms there, and likely were unwilling to relocate after the 1882 Act was enacted.

Instead of a shift from a majority Indian population to a majority non-Indian population following the enactment of the 1882 Act, the demographics in the area west of the right of way changed from being barely populated to being sparsely populated primarily by non-Indians. When the 1882 Act was enacted, approximately 1,200 Omaha tribal members resided on the Reservation, the majority of whom resided east of the right of way.[161] According to Plaintiffs' expert, the population of non-Indians in Thurston and Cuming Counties west of the right way peaked in 1900 at slightly more than 4,300 people.[162] In the years between 1900 and 1930, and between 1990 and 2000, the total population of non-Indians in these Counties west of the right of way fluctuated between approximately 2,500 and 4,100 people, but never exceeded the 1900 population figure.[163] Plaintiffs' expert report indicates that during these same periods, the Indian population west of the right of way fluctuated between 2 and 72 people.[164] As indicated on Indian Census Rolls prepared between 1890 and 1930,

---

[161] 1882 Cong. Rec. at 6538 (statement of Representative Haskell).

[162] Plaintiffs' Expert Report at 27.

[163] *Id.*

[164] *Id.*

however, the population of Omaha tribal members was much higher, fluctuating between nearly 1,200 and 1,600.[165] While Plaintiffs' expert report shows that the majority population west of the right of way was non-Indian following the enactment of the 1882 Act, such fact is consistent with the residency patterns of Omaha tribal members before and after the 1882 Act.

Moreover, in this case, the demographic information should not be given greater consideration than the language of the 1882 Act itself, or its legislative history, or the circumstances surrounding the passage of the Act. Since all fail to demonstrate the requisite congressional intent to diminish the Omaha Reservation, the more recent reservation demographic data does not alter our conclusion that Congress did not intend to diminish the Omaha Reservation when it enacted the 1882 Act.

In summary, under the guiding principle that diminishment "will not be lightly inferred" and that

---

[165] *See* 1890 Census of the Omaha Indians, National Archives Microfilm Pub. No. M595_311, p. 1, 66 (enumerating 1,173 tribal members); 1900 Census of the Omahas, National Archives Microfilm Pub. No. M595_314, pp. 1, 71 (enumerating 1,182 tribal members); 1910 Census of the Omaha, National Archives Microfilm Pub. No. M595_664, pp. 1, 51 (enumerating 1,276 tribal members); 1920 Census of the Omaha Indians, National Archives Microfilm Pub. No. M595_314, p. 1, 71 (enumerating 1,242 tribal members); 1930 Census of the Omaha Tribe, National Archives Microfilm Pub. No. M595_667 at 1, 129 (enumerating 1,574 tribal members).

Congress must clearly evince an "intent to change boundaries before diminishment will be found,"[166] we conclude that neither the 1872 or 1882 Acts evidence the requisite congressional intent to diminish the Omaha Reservation. Under *Solem* and its progeny, the most probative evidence of congressional intent to diminish a reservation is the statutory language used to open the Indian lands. The Supreme Court repeatedly has stated that the act of opening a reservation alone does not diminish or terminate the Indian country status of such reservation. Instead, Congress's intent to diminish a reservation must be "clear and plain."[167] The 1872 and 1882 Acts do not contain explicit statements of land cession coupled with a sum certain amount of compensation; nor did they require that Omaha tribal members vacate the land west of the railroad right of way. Indeed, the 1882 Act guaranteed Tribal members the right to take allotments in the opened area of the Reservation. Moreover, the circumstances surrounding the 1882 Act's passage and the subsequent treatment of the opened area also fail to evidence congressional intent to diminish the Omaha Reservation.

"Once a block of land is set aside for an Indian reservation, no matter what happens to the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates

---

[166] *Solem*, 465 U.S. at 470.

[167] *Yankton*, 522 U.S. at 343.

otherwise."[168] Congress failed to evince an explicit indication or a "clear and plain" intent to diminish the Omaha Reservation when it enacted the 1882 Act. We cannot do now what Congress failed to do in 1882.

IV. Withdrawal of the 1989 Opinion

The 1989 Opinion issued by the Twin Cities Field Solicitor's Office relied on demographics alone to conclude that the 1882 Act diminished the Omaha Reservation.[169] Because this conclusion is legally and factually flawed, we withdrew the 1989 Opinion and instructed the Twin Cities Field Solicitor not to rely on it.[170]

The 1989 Opinion acknowledges, however, that "on the basis of the [statutory] language alone, diminishment was not the intent of Congress."[171] Despite acknowledging that the most probative evidence of congressional intent to diminish – the language of the 1882 Act[172] – did not evidence Congress's intent to diminish the Reservation, the 1989 Opinion relied on flawed and incomplete factual information regarding the implementation of the 1882 Act to conclude that

---

[168] *Id.* (quoting *Solem*, 465 U.S. at 470).

[169] 1989 Opinion at 10-11.

[170] Letter from Patrice H. Kunesh, Deputy Solicitor – Indian Affairs, to Priscilla Wilfahrt, Twin Cities Field Solicitor (Apr. 16, 2012) (attached as Exhibit K).

[171] *Id.* at 4.

[172] *Solem*, 465 U.S. at 470.

the Reservation was diminished by the statute. To support that conclusion, the 1989 Opinion stated that "no Indian trust allotments were made on lands lying *west* of the Sioux City and Nebraska Railroad right of way."[173] As discussed above, we now know this assertion is wrong. By relying on this incorrect factual assumption, the 1989 Opinion not only ignored the Supreme Court's warning that "[r]esorting to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation,"[174] it also drew factual conclusions without the benefit of an adequate factual record to support the conclusions drawn.

In addition, not only did Omaha tribal members select allotments west of the right of way after the 1882 Act, they also resided in the Village of Pender and were active in the development of the community there. While many Omaha tribal members may have chosen to select or remain on allotments in the eastern portion of the Reservation, they arguably did so based on the Tribe's historical ties to the Missouri River and the three villages adjacent thereto; not, as Plaintiffs' expert contends, due to the Tribe's alleged lack of interest in the western portion of the Reservation or because the Tribe understood that the Reservation no longer included lands west of the right of way. Because the 1989 Opinion failed to analyze the

---

[173] 1989 Opinion at 4.

[174] *Solem*, 465 U.S. at 470 n.13.

question of reservation diminishment consistent with Supreme Court case law, and because it relied on flawed and incomplete factual information, we reject the conclusion reached in the 1989 Opinion and advise that it should not be relied upon.

V. 2008 Opinion

In 2008, the Twin Cities Field Solicitor questioned the analysis in the 1989 Opinion and decided to reevaluate the question of whether the 1882 Act, or any other statute pertaining to the Omaha Reservation, diminished the Reservation. After reviewing the 1989 Opinion and the development of case law on reservation diminishment, the Field Solicitor prepared the 2008 Opinion, concluding that the 1989 Opinion was based on incorrect assumptions and contained a flawed legal analysis. The 2008 Opinion also recommended that the Omaha Tribe retain an expert historian to develop the historical record pertaining to the Reservation.

This office concludes that the 2008 Opinion provides an accurate application of the legal framework for evaluating the issue of reservation diminishment and is consistent with the framework set forth in Section I of this memorandum. The Tribe's and Plaintiffs' expert reports, prepared in connection with the *Village of Parker v. Pender* litigation, provide important historical background information that supplement the analysis in the 2008 Opinion. After reviewing these expert reports, the 1989 Opinion, the

2008 Opinion, and after conducting our own research on the matter, this office concludes that the Omaha Reservation was not diminished by either the 1872 Act, the 1882 Act, or any of the other statutes discussed in the 2008 Opinion.

VI. Conclusion

The statutory language of the 1882 Act, the surrounding circumstances of its enactment, and the subsequent treatment of the opened area all demonstrate that Congress did not intend to diminish the Omaha Reservation. In addition to the 1882 Act, none of the other statutes discussed above or in the 2008 Opinion evidence the clear and plain intent of Congress to diminish the Omaha Reservation. For these reasons, it is the position of this office that the western boundary of the Omaha Reservation has not been diminished.

No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX, VOLUME II

JAMES D. SMITH
Solicitor General
of Nebraska
OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov
Counsel of Record
for Petitioners

DONALD B. VERRILLI, JR.
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel of Record for
Respondent United States

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Avenue, N.W.,
Seventh Floor
Washington, D.C. 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel of Record for
Tribal Respondents

Petition For Certiorari Filed May 27, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of

TABLE OF CONTENTS

Page

VOLUME II

Complaint-In-Intervention of Intervenor State of Nebraska, filed June 17, 2013 285

Answer of Intervenor-Defendant United States to Plaintiffs' Second Amended Complaint, filed June 19, 2013 300

Expert Report submitted by Emily Greenwald, Ph.D., Historical Research Associates, Inc., filed June 24, 2013 315

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1867, filed June 24, 2013 374

General Land Office Survey, 1867, filed June 24, 2013 407

General Land Office Survey, 1867, filed June 24, 2013 408

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1869, filed June 24, 2013 409

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1871, filed June 24, 2013 413

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1872, filed June 24, 2013 430

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1873, filed June 24, 2013 443

TABLE OF CONTENTS – Continued

Page

Superintendents' Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1935 Annual Statistical Report, filed June 24, 2013 446

Excerpts from 13 Cong. Rec. 48 (1882), filed June 24, 2013 448

Excerpts from 13 Cong. Rec. 3077-79 (1882), filed June 24, 2013 457

Excerpts from 13 Cong. Rec. 3880 (1882), filed June 24, 2013 470

Excerpts from 13 Cong. Rec. 6842-43 (1882), filed June 24, 2013 471

Excerpts from 13 Cong. Rec. 6998 (1882), filed June 24, 2013 473

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1882, filed June 24, 2013 477

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1883, filed June 24, 2013 479

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1884, filed June 24, 2013 482

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1885, filed June 24, 2013 495

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1874, filed June 24, 2013 504

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1875, filed June 24, 2013 506

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1876, filed June 24, 2013 510

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1888, filed June 24, 2013 513

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1898, filed June 24, 2013 516

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1900, filed June 24, 2013 520

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1906, filed June 24, 2013 524

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1909, filed June 24, 2013 530

TABLE OF CONTENTS – Continued

Page

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1911, filed June 24, 2013 535

Superintendents' Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1935 Annual Statistical Report, filed June 24, 2013 540

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, et al.,

Plaintiffs,

and

STATE OF NEBRASKA,

Plaintiff-Intervenor,

v.

MITCH PARKER, in his official capacity as Chairman of the Omaha Tribal Council, et al.,

Defendants.

Case No. 4:07CV3101

COMPLAINT-IN-INTERVENTION OF INTERVENOR STATE OF NEBRASKA

(Filed Jun. 17, 2013)

PARTIES

1. Plaintiff-Intervenor State of Nebraska (hereinafter the "State" or "Intervenor") is a sovereign state and protector of the public health, safety and welfare of its citizens and residents throughout the State's territory including, but not limited to, those areas of Thurston County west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad Company diminished from the Omaha Indian Reservation by Congress in 1882.

2. Plaintiff Village of Pender, Nebraska ("Pender") is a village as defined in NEB. REV. STAT. § 17-201, a political subdivision within the State of Nebraska, and the County Seat of Thurston County, Nebraska, and exercises governmental jurisdiction only within the municipal boundaries of Pender itself.

3. Plaintiffs Richard M. Smith, Donna Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Keith Brehmer, and Ron Brinkman (collectively the "Liquor Retailers") are owners, managers, or operators of various establishments in Pender, Thurston County, Nebraska which sell alcoholic beverages for on- or off-premises consumption.

4. Defendants Mitch Parker, Barry Webster, Amen Sheridan, Rodney Morris, Orville Cayou, Eleanor Baxter, and Ansley Grifin are various officials of the Omaha Tribe of Nebraska (hereinafter the "Omaha Tribe" or "Tribe"), a federally-recognized Indian tribe and are sued in their official capacities.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States.

6. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. § 2201.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) as all Defendants are residents of Nebraska.

INTRODUCTION

8. In their Second Amended Complaint, Plaintiff Liquor Retailers set forth allegations that the Omaha Tribe is attempting to enforce the Tribe's liquor license and tax scheme, which exists to govern the sale of alcohol within the Omaha Indian Reservation, upon Plaintiff Liquor Retailers' businesses which are located within Pender and *not* within the Omaha Indian Reservation or "Indian Country."

9. Additionally, in the Second Amended Complaint, Plaintiff Village of Pender set forth allegations that the Tribe is attempting to regulate the affairs of non-Indians on non-reservation land in excess of its tribal authority under federal common law through the exercise of governing and legislative authority over residents and business located within the boundaries of Pender.

10. The Omaha Tribe's attempt to assert jurisdiction over Plaintiffs is premised upon the notion that Pender and its surrounding areas (specifically, the approximately more than 50,000 acres of Thurston County west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad) (hereinafter the "Disputed Area") have *not* been diminished by the United States Congress and remain

either part of the Omaha Indian Reservation, specifically, or "Indian Country," generally.

11. Plaintiffs Village of Pender and Liquor Retailers, by nature of their location and municipal boundaries, respectively, have made allegations and asserted claims toward the aim of resisting the Tribe's lawless assertion of jurisdiction within Pender itself, but are not situated to challenge the Tribe's assertion of jurisdiction in areas beyond Pender's boundaries.

12. Additionally, the United States Department of Justice (hereinafter "DOJ") advised the State on October 9, 2012 that it is the conclusion of the United States Government that the Disputed Area has not been diminished from the Omaha Indian Reservation and that DOJ "intends to assert the same federal jurisdiction in Pender that [it] routinely exercise[s] in other parts of 'Indian Country'. [sic]" Letter from Deborah R. Gilg, United States Attorney for the District of Nebraska, to David Heineman, Governor of Nebraska (Oct. 9, 2012) (attached hereto as Exhibit "1").

13. In addition to the Tribe's assertion of alcoholic beverage control authority within the Disputed Area, on February 12, 2013 the Tribe demanded the Nebraska Department of Revenue remit a share of the motor fuels tax attributable to retailers in the Disputed Area to the Tribe for the same reasoning, i.e., that the Disputed Area remains within the

boundaries of the Omaha Indian Reservation.

14. These various assertions of jurisdiction – one of a specific nature by the Omaha Tribe, the other of a general nature by the United States Government – represent a clear and imminent threat to the State's ability to protect the public health, safety and welfare of its citizens and residents within the Disputed Area and highlights the need for a definitive federal court ruling on the status of the Disputed Area.

15. Accordingly, Plaintiff-Intervenor State of Nebraska brings this action to obtain declaratory and injunctive relief in order to resist the Tribe's unfounded assertion of *any* governmental jurisdiction over the entirety of the Disputed Area, not only Pender.

FACTUAL ALLEGATIONS

The Disputed Area

16. The Disputed Area is comprised of approximately 50,157 acres of Thurston County, Nebraska – approximately 78 square miles of territory – lying west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad, as that term is defined in the 1882 Act of Congress (hereinafter the "1882 Act").

17. The Disputed Area consists of the Village of Pender but also areas lying beyond Pender's municipal boundaries.

18. The 1882 Act authorized the sale of part of the Omaha Indian Reservation west of the railroad right-of-way to homesteaders; this area constitutes the Disputed Area.

19. In the 1882 Act, the lands west of the railroad right-of-way were not held in trust for the Omaha Tribe but were instead opened up to non-Indian settlement.

20. The 1882 Act established a process whereby homesteaders obtained the land west of the railroad right-of-way directly from the United States Government, with the proceeds credited to the Omaha Tribe. The land west of the railroad right of way was sold to and settled by non-Indians.

21. In the event that any homesteader defaulted on a payment, the land did not revert back to the Omaha Tribe, but was sold at public auction.

22. As a result of the 1882 Act, the Disputed Area is not part of any federally recognized Indian reservation.

23. Likewise, the Disputed Area is not part of "Indian Country" because it is not a dependent Indian community, has not been set aside by the federal government for use by Indians as Indian land, and is not under federal superintendence.

24. The Omaha Tribe does not offer any tribal government services to its members in the Disputed Area nor does the Omaha Tribe exercise civil jurisdiction in the Disputed Area.

25. The Disputed Area is policed not by the Omaha Tribe, but by the Nebraska State Patrol and the Thurston County Sheriff.

26. Currently, there is virtually no allotment land and no Indian trust land within the Disputed Area.

27 The Disputed Area is governed by the State of Nebraska which exercises civil and legislative jurisdiction over the citizens and businesses located within the Disputed Area.

28. The Thurston County District Court, the State of Nebraska, and, for a period of at least one hundred years preceding a reversal of its position, the United States Government, have all determined that the Disputed Area is not part of the Omaha Indian Reservation.

The Tribe's Fuel Tax Demand

29. On February 12, 2013, the Omaha Tribe sent a letter to the Nebraska Department of Revenue which stated, in pertinent part:

> "[T]he Omaha Tribe hereby demands that the Nebraska Department of Revenue forward the tribal share of fuel tax revenue attributable to retailers located west of [the now-abandoned right-of-way of the Sioux City and Nebraska Railroad Company]. . . ."

Letter from Rodney Morris, Omaha Tribal Chairman, to Douglas A. Ewald, Tax Commissioner, Nebraska Department of Revenue (Feb. 12, 2013) (attached hereto as Exhibit "2").

30. The Tribe's demand is applicable to fuel tax collections throughout the Disputed Area, not only within Pender.

31. The Tribe's demand is premised upon a conclusion that the Disputed Area has not been diminished from the Omaha Reservation and that "the original boundary remains intact." *See id.*

CLAIM FOR RELIEF
(Exceeding Tribal authority under Federal Common Law)

32. The State hereby incorporates all of the preceding paragraphs as though set forth fully herein.

33. The Disputed Area was diminished from the Omaha Indian Reservation by Congress in 1882, is not located within the boundaries of the Omaha Indian Reservation, and does not constitute Indian Country.

34. Defendants' attempt to collect from the Nebraska Department of Revenue the tribal share of the fuel tax revenue attributable to retailers located within the Disputed Area is an act in excess of Tribal Authority and thus a violation of federal common law as set forth by the Supreme Court.

WHEREFORE, Plaintiff-Intervenor State of Nebraska respectfully requests this Court (1) enter judgment declaring that the Omaha Indian Reservation was diminished by the 1882 Act and that Disputed Area is not within the boundaries of the Omaha Indian Reservation and does not constitute Indian Country; (2) issue permanent injunctions prohibiting the Omaha Indian Tribe, its employees and agents, and all persons acting under its direction, from asserting any Tribal jurisdiction whatsoever within the Disputed Area on the basis that said area remains within the Omaha Indian Reservation or constitutes Indian Country; and (3) any other such relief as this Court deems appropriate.

Submitted this 14th day of March, 2013.

STATE OF NEBRASKA,
Applicant for Intervention.

By: JON BRUNING, NE #20351
Attorney General of Nebraska

By: *s/ David D. Cookson*
David D. Cookson, NE #18681
Chief Deputy Attorney General

Katherine J. Spohn, NE #22979
Deputy Attorney General

Ryan S. Post, NE #24714
David A. Lopez, NE #24947
Assistant Attorneys General

2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

David.Cookson@nebraska.gov
Katie.Spohn@nebraska.gov
Ryan.Post@nebraska.gov
Dave.Lopez@nebraska.gov

Attorneys for Applicant for Intervention.

EXHIBIT 1

[SEAL]

U.S Department of Justice 503603

United States Attorney
District of Nebraska

1620 Dodge Street, Suite 1400 PH: (402) 661-3700
Omaha, Nebraska 68102-1506 FAX: (402) 661-3084

October 9, 2012

GOVERNORS OFFICE

Governor David Heineman
Office of the Governor
P.O. Box 94848
Lincoln, NE 68509-4848

OCT 11 2012

RECEIVED

RE: Omaha Indian Reservation and the Village of Pender

Dear Governor Heineman:

As you know the exact location of the western border of the Omaha Indian Reservation in Thurston

County has been a matter of longstanding dispute. Specifically, the issue has centered on the question of whether Congress had "diminished" the reservation by actions taken after the reservation's establishment that opened up certain areas for settlement. In practical effect, the primary question presented has been whether the Village of Pender is inside the exterior boundaries of the reservation.

The United States Department of the Interior recently concluded an extensive historical review of the matter. The Department of the Interior has advised us that it is their conclusion that the Omaha reservation was NOT diminished by subsequent Congressional enactment. Based upon the guidance provided by the Department of Interior, the United States Department of Justice has filed a brief in the Omaha Tribal Court in the case entitled *The Village of Pender, Nebraska, et al. v. Mitch Parker, et al.*, (Civ. No. 08-002, Omaha Tribal Court), taking the position that the reservation has not been diminished.

My office has contacted various stakeholders in this dispute to advise them of the position being advanced by the Departments of Interior and Justice. We have advised them that the United States Department of Justice intends to assert the same federal jurisdiction in Pender that we routinely exercise in other parts of "Indian Country". Despite the concerns of many, I doubt this will have significant impact on the average non-Native American resident of the Pender area given the relative demographics of village.

Federal jurisdiction can be briefly summarized in a few points:

- "Major crimes", (murder,. manslaughter, kidnapping, maiming, felony sexual assault, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, felony theft over $1,000), committed by Native Americans within the boundaries of the reservation, including those committed within the Village of Pender, are subject to federal prosecution in United States District Court.

- For all offenses committed by Native Americans there may be concurrent jurisdiction between the Tribe and the federal government. However, Native Americans who commit crimes within the boundaries of the reservation are not subject to prosecution in state court. An exception exists for those offenses involving the operation of motor vehicles on public roads or highways. Those offenses, if committed by Native Americans within reservation boundaries, are subject to prosecution in state court but not federal or tribal court.

- Any offenses committed by non-Native Americans against the person or property of Native Americans within reservation boundaries, including within the Village of Pender, are subject to federal prosecution in United States District Court but not in state or tribal court.

- Most offenses committed by non-Native Americans against the person or property of other non-Native Americans are not subject to federal or

tribal prosecution. The state courts retain exclusive jurisdiction over most of such offenses. (There are exceptions for federal crimes of general applicability, e.g., bank robbery).

I hope this letter is helpful in understanding our position. Please call if you wish to discuss the matter in more detail.

Sincerely,

/s/ D R Gilg
DEBORAH R. GILG
United States Attorney
District of Nebraka

DRG/js

EXHIBIT 2

OMAHA TRIBE OF NEBRASKA

[SEAL]

TRIBAL ADMINISTRATION

P. O. Box 368
Macy, Nebraska 68039

(402) 837-5391
FAX (402) 837-5308

EXECUTIVE OFFICERS
Rodney Morris, Chairman
Doran Morris, Jr., Vice-Chairman
Tillie Aldrich, Treasurer
Gwen Porter, Secretary

MEMBERS
Jeffrey S. Miller, Member
Mitchell Parker, Member
Forrest Aldrich, Jr., Member

February 12, 2013

Douglas A. Ewald, Tax Commissioner
Nebraska Department of Revenue
PO Box 94818
Lincoln NE 68509-4818

Re: DEMAND FOR PAYMENT OF TAX REVENUE
Agreement for Collection and Dissemination of Motor Fuels Tax

Mr. Ewald:

This is in follow up to your letter dated February 23, 2007, addressed to Orville Cayou as Tribal Chairman. In your letter you stated that the Department of Revenue would cease sharing fuel tax revenue from retailers in Pender as of March 1, 2007, based on an opinion from the Nebraska Attorney General regarding the boundary of the Omaha Indian Reservation. Specifically, the Attorney General opined "that the property west of the center of the right-of-way described

in the 1882 Act [22 Stat. 341] should not be considered part of the Omaha Reservation." *Neb. Att'y Gen. Op. No. 07005* at 5.

Enclosed is a recent opinion from the Omaha Tribal Court in the lawsuit filed by the Village of Pender and certain Pender residents challenging the boundary of the Omaha Indian Reservation. The opinion finds that the 1882 Act referenced by the Attorney General did not diminish the boundary of the Reservation, and the original boundary remains intact.

Accordingly, the Omaha Tribe hereby demands that the Nebraska Department of Revenue forward the tribal share of the fuel tax revenue attributable to retailers located west of the referenced right-of-way from March 1, 2007 to the present, including but not limited to Glissman Oil, Neska Oil, and Smith Farm Service, Inc. Additionally the Omaha Tribe demands that the Department of Revenue continue to include any such retailers in future fuel tax calculations pursuant to the Agreement. Please also provide statements accounting for collection and dissemination of fuel tax revenues during these periods.

Sincerely,

/s/ Rodney Morris
Rodney Morris
Omaha Tribal Chairman

Encl. Letter dated 2/23/07 from Douglas Ewald to Orville Cayou
Opinion of Omaha Tribal Court dated 2/4/13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RICHARD SMITH, et al., Plaintiffs, and STATE OF NEBRASKA, Plaintiff-Intervenor v. MITCH PARKER, in his official capacity as Chairman of the Omaha Tribal Council, et al., Defendants, and THE UNITED STATES, Defendant-Intervenor	Case No. 4:07-cv-3101

ANSWER OF INTERVENOR-DEFENDANT UNITED STATES TO PLAINTIFFS' SECOND AMENDED COMPLAINT

(Filed Jun. 19, 2013)

The United States, as Intervenor-Defendant ("Intervenor"), respectfully submits this Answer to Plaintiffs' Second Amended Complaint. Any allegations not specifically referenced herein are denied.

PARTIES

1. Intervenor admits that the Village of Pender is the County Seat of Thurston County, Nebraska, but lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations of Paragraph 1 and on that basis, denies the allegations.

2. Paragraph 2 consists of characterizations of plaintiffs Richard M. Smith and Donna Smith which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 2 and on that basis, denies the allegations.

3. Paragraph 3 consists of characterizations of plaintiffs Jay and Julie Lake which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 3 and on that basis, denies the allegations.

4. Paragraph 4 consists of characterizations of plaintiffs Doug and Susan Schrieber which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 4 and on that basis, denies the allegations.

5. Paragraph 5 consists of characterizations of plaintiff Thomas J. Welsh which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief

as to the truth of the allegations in Paragraph 5 and on that basis, denies the allegations.

6. Paragraph 6 consists of characterizations of plaintiff Rodney A. Heise which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 6 and on that basis, denies the allegations.

7. Paragraph 7 consists of characterizations of plaintiff Keith Brehmer which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 7 and on that basis, denies the allegations.

8. Paragraph 8 consists of characterizations of plaintiff Ron Brinkman which require no response. To the extent a response is required, Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 8 and on that basis, denies the allegations.

9. Paragraph 9 consists of characterizations of defendant Mitch Parker, which require no response. To the extent a response is required, Intervenor denies that Mr. Parker is the Chairman of the Omaha Tribe.

10. Paragraph 10 consists of characterizations of defendant Barry Webster, to which no response is required. To the extent a response is required,

Intervenor denies that Mr. Webster is the Vice-Chairman of the Omaha Tribal Council.

11. Paragraph 11 consists of characterizations of defendant Amen Sheridan, to which no response is required. To the extent a response is required, Intervenor denies that Amen Sheridan is Treasurer of the Omaha Tribal Council.

12. Paragraph 12 consists of characterizations of defendant Rodney Morris, which require no response. To the extent a response is required, Intervenor denies that Mr. Morris is Secretary of the Omaha Tribal Council.

13. Paragraph 13 consists of characterizations of defendant Orville Cayou, which require no response. To the extent a response is required, Intervenor denies that Mr. Cayou is member of the Omaha Tribal Council.

14. Paragraph 14 consists of characterizations of defendant Eleanor Baxter, which require no response. To the extent a response is required, Intervenor denies that Ms. Baxter is a member of the Omaha Tribal Council.

15. Paragraph 15 consists of characterizations of defendant Ansley Griffin, which require no response. To the extent a response is required, Intervenor denies that Mr. Griffin is a member of the Omaha Tribal Council and lacks sufficient knowledge or information to form a belief as to the truth of the

remaining allegations in Paragraph 15 and on that basis, denies the allegations.

16. The allegations in Paragraph 16 consist of Plaintiffs' characterization of this suit, the manner and capacity in which the Defendants are sued, and the relief which is sought, to which no response is required. Intervenor denies the factual and legal sufficiency of Plaintiffs' claims, and denies that Plaintiffs are entitled to any relief in this case.

JURISDICTION AND VENUE

17. The allegations in Paragraph 17 consist of Plaintiffs' characterization of this suit and conclusions of law, to which no response is required.

18. The allegations in Paragraph 18 state legal conclusions to which no response is required.

19. The allegations in Paragraph 19 state legal conclusions to which no response is required.

INTRODUCTION

20. Denied.

21. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 21, and on that basis denies the allegations.

22. Denied.

23. Denied.

24. Intervenor denies the Plaintiffs' characterization of their businesses as "off-reservation." Intervenor admits that the Tribe adopted a beverage control ordinance containing, *inter alia*, provisions regarding tribal liquor licensing and taxes applicable within the Omaha Tribe's reservation. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 24, and on that basis denies the remaining allegations.

25. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25, and on that basis denies the allegations.

26. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26, and on that basis denies the allegations. Intervenor admits that the Plaintiffs have attached to other pleadings certain notices from the Omaha Tribe regarding the Alcoholic Beverage Control title, Title 8 of the Omaha Tribal Code, which notices speak for themselves, and Intervenor denies any characterization inconsistent therewith.

27. Intervenor denies that Plaintiffs are on "non-reservation lands." Intervenor states further that the allegations in Paragraph 27 consist of Plaintiffs' characterization of this suit and conclusions of law, to which no response is required. To the extent a response is required, Intervenor denies the allegations.

28. The allegations in Paragraph 28 consist of Plaintiffs' characterization of this suit and conclusions of law, to which no response is required. To the extent a response is required, Intervenor denies the allegations.

29. The allegations in Paragraph 29 consist of Plaintiffs' characterization of this suit and conclusions of law, to which no response is required. To the extent a response is required, Intervenor denies the allegations. Intervenor denies that Plaintiffs are entitled to any relief in this case.

FACTUAL ALLEGATIONS

The Liquor and Tax Scheme

30. Intervenor admits that the Bureau of Indian Affairs, U.S. Department of the Interior, published a Notice titled "Amendment (Title 8 of the Tribal Code) to Omaha Tribe's Beverage Control Ordinance" at 71 Fed. Reg. 10056 (Feb. 28, 2006) (the "Notice"), but denies that the Notice is attached to the Second Amended Complaint.

31. The allegations in Paragraph 31 characterize the Notice, which speaks for itself, and Intervenor denies any characterization inconsistent therewith.

32. The allegations in Paragraph 32 characterize the Notice, which speaks for itself, and Intervenor denies any characterization inconsistent therewith.

33. The allegations in Paragraph 33 characterize the Notice, which speaks for itself, and Intervenor denies any characterization inconsistent therewith.

34. The allegations in Paragraph 34 characterize the Notice, which speaks for itself, and Intervenor denies any characterization inconsistent therewith.

35. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 35, and on that basis denies the allegations. Intervenor admits that the Plaintiffs have attached to other pleadings certain notices from the Omaha Tribe regarding the Alcoholic Beverage Control title, Title 8 of the Omaha Tribal Code, which notices speak for themselves, and Intervenor denies any characterization inconsistent therewith.

36. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 36, and on that basis denies the allegations.

37. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 37, and on that basis denies the allegations.

The Location and Nature of the Liquor Retailers

38. Denied.

39. Denied.

40. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 40, and on that basis denies the allegations.

41. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 41, and on that basis denies the allegations.

42. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 42, and on that basis denies the allegations.

43. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 43, and on that basis denies the allegations.

44. Admitted.

45. Intervenor admits that Pender is situated on land that lies west of the Sioux City and Nebraska Railroad right-of-way, but refers the Court to the 1882 Act of Congress, 22 Stat. 341 (the "1882 Act"), for the manner in which that term, and other terms, are defined and utilized in the 1882 Act.

46. The allegations in Paragraph 46 characterize a statute, which speaks for itself and is the best evidence of its contents, and Intervenor denies any characterization inconsistent therewith. Intervenor specifically denies that land west of the railroad right of way was opened exclusively to non-Indian

settlement. Intervenor also denies the allegations in Paragraph 46 to the extent they allege or imply that the 1882 Act in any way diminished the Omaha Tribe's reservation.

47. The allegations in Paragraph 47 characterize a statute, which speaks for itself and is the best evidence of its contents, and Intervenor denies any characterization inconsistent therewith. Intervenor specifically denies that land west of the railroad right of way was opened exclusively to non-Indian settlement, or that land west of the railroad right of way constituted only unallotted, non-trust land. Intervenor also denies the allegations in Paragraph 47 to the extent they allege or imply that the 1882 Act in any way diminished the Omaha Tribe's reservation.

48. The allegations in Paragraph 48 characterize a statute, which speaks for itself and is the best evidence of its contents, and Intervenor denies any characterization inconsistent therewith. Intervenor admits that some of the land west of the railroad right of way was opened to settlement by non-Indians, but denies that the land was sold to and settled by non-Indians exclusively. Intervenor also denies the allegations in Paragraph 48 to the extent they allege or imply that the 1882 Act in any way diminished the Omaha Tribe's reservation.

49. The allegations in Paragraph 49 characterize a statute, which speaks for itself and is the best evidence of its contents, and Intervenor denies any characterization inconsistent therewith. Intervenor

specifically denies that the allegations in Paragraph 49 are contained within the 1882 Act.

50. Denied.

51. Denied.

52. Denied.

53. Intervenor avers that the State of Nebraska retroceded its criminal jurisdiction over the Omaha Tribe's reservation, which was defined as including the Village of Pender, back to the federal government in 1970, except for "offenses involving the operation of motor vehicles on public roads or highways." 35 Fed. Reg. 16,598 (Oct. 16, 1970). Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in paragraph 53, and on that basis denies the allegations.

54. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of Paragraph 54, and on that basis denies the allegations. Intervenor denies the allegations in the second sentence of Paragraph 54.

55. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first sentence of Paragraph 55, and on that basis denies the allegations. Intervenor denies that the amount of allotment or trust land west of the railroad right of way has any bearing on the legal issues in this case. Intervenor states that the 1882 Act expressly provided for allotments in the Disputed

Area, that allotments were made in the Disputed Area, and that the Tribe owns property in the Disputed Area.

56. Intervenor denies the allegations in Paragraph 56 as inaccurate and incomplete regarding the formal legal positions of the entities described therein. Intervenor states that federal agencies, including the Bureau of Indian Affairs of the United States Department of the Interior, have determined that Pender is within the boundaries of the Omaha Tribe's reservation. Intervenor states further that the United States Congress did not change the boundaries of the Omaha Tribe's reservation by the 1882 Act or any other action. Finally, Intervenor states that opinions from Thurston County District Court and the Nebraska Attorney General have no legal bearing on the reservation boundaries of the Omaha Tribe.

57. Intervenor lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 57, but states that Pender is part of the Omaha Indian Reservation and, upon information and belief, The Omaha Tribe has applied the Omaha Tribe's liquor ordinance to liquor retailers, including some of the plaintiffs.

FIRST CLAIM FOR RELIEF
(Violation of 18 U.S.C. § 1161)

58. Intervenor restates and incorporates its responses to Paragraphs 1 through 57.

59. Admitted.

60. Denied.

SECOND CLAIM FOR RELIEF
(Exceeding Tribal authority under Federal Common Law)

61. Intervenor restates and incorporates its responses to Paragraphs 1 through 60.

62. Denied.

63. Denied.

Plaintiffs' Prayer for Relief

The allegations contained in the remaining, unnumbered paragraphs of Plaintiffs' Second Amended Complaint constitute a prayer for relief to which no response is required. To the extent a further response is required, Intervenor denies that Plaintiffs are entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claims are barred in whole or in part for failure to state a claim upon which relief can be granted.

2. Plaintiffs' claims are barred in whole or in part because Pender and the Plaintiffs' businesses are located within the boundaries of the Omaha Tribe's

reservation, as established by the Treaties of 1854 and 1865.

3. Plaintiffs' claims are barred in whole or in part because the Omaha Tribe's reservation boundaries have not been reduced or diminished (by the 1882 Act or otherwise).

4. Plaintiffs' claims are barred in whole or in part based on reasonable statutory interpretation by federal agencies, including the Bureau of Indian Affairs of the U.S. Department of the Interior, that the 1882 Act did not reduce or diminish the boundaries of the Omaha Tribe's reservation, a conclusion that is neither arbitrary, capricious, nor manifestly contrary to the statute.

5. Plaintiffs' claims are barred in whole or in part because Plaintiffs could not have reasonably relied on any opinion that the boundaries of the Omaha Tribe's reservation were diminished.

6. The claims of Plaintiff Village of Pender, Nebraska, are barred in whole or in part for lack of standing.

7. Plaintiffs' claims are barred in whole or in part by the doctrine of estoppel and/or waiver.

8. Intervenor reserves the right to assert all other affirmative defenses that may be revealed subsequent to this filing.

WHEREFORE, Intervenor respectfully requests the Court to dismiss this action with prejudice, enter

judgment in favor of the Defendants and against the Plaintiffs, and grant such other relief the Court deems just and proper.

Dated: June 19, 2013

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant
Attorney General
Environment and Natural
Resources Division

/s/ Daron T. Carreiro
DARON T. CARREIRO,
Trial Attorney
Indian Resources Section
Environment and Natural
Resources Division
United States Department
of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Phone: (202) 305-1117
Fax: (202) 305-0275
daron.carreiro@usdoj.gov

Attorneys for the
United States

Of Counsel:

Rebecca Ross,
Attorney-Advisor
U.S. Department
of the Interior
Office of the Solicitor
1849 C Street N.W.
Washington, D.C. 20240
Phone: (202) 208-4218
rebecca.ross@sol.doi.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EXHIBIT A

(Filed Jun. 24, 2013)

The Western Boundary of the Omaha Indian Reservation

Submitted by

Emily Greenwald, Ph.D.
Missoula, Montana

August 31, 2011

Table of Contents

Introduction and Summary of Opinions..... 1
Federal Indian Policy and the Creation of the Omaha Reservation 4
The First Omaha Allotment..... 7
The 1872 Land Sale 9
The 1882 Act..... 11
The Second Allotment and Land Sale..... 16
Subsequent Allotments..... 20
Settlement of the Opened Lands 22

Size of the Omaha Indian Reservation 24

Demographic History 26

Current Treatment of Area West of Right of Way 28

Conclusion 30

List of Figures

Figure 1. Undated map of the Winnebago Agency, showing the Omaha Indian Reservation; Pender, Nebraska; and the Chicago, St. Paul, and Omaha Railroad..... 4

List of Tables

Table 1. Indian and Non-Indian Population East and West of Railroad Right of Way..... 27

Table 2. Summary, Percentage of Non-Indian Population by Decade..... 28

Introduction and Summary of Opinions

The Village of Pender, Nebraska is currently involved in litigation with the Omaha Indian Tribe over the location of the western boundary of the Omaha Indian Reservation in Nebraska[1] Pender

---

[1] *Pender v. Parker*, No. 4:07-CV-03101 (D. Neb. filed April 11, 2007), and *Pender v. Parker*, Civ. No. 08-002 (Omaha Tribal Court, filed Jan. 4, 2008). Both actions generally involve whether the Omaha Tribe can enforce Title 8 of the Omaha Tribal Code relating to the licensing and taxation of the sale of alcoholic beverages west of the railroad right of way.

asked that Historical Research Associates, Inc., (HRA) investigate the history of the western boundary of the reservation and specifically explore whether the Act of August 7, 1882, 22 Stat. 341 (the "1882 Act") had the effect of moving the boundary from its original location as surveyed in 1866-1867 eastward to the railroad right of way identified in the 1882 Act. HRA researched whether the historical circumstances surrounding and immediately following the passage of the 1882 Act indicated an understanding on the part of Congress and the Omaha Tribe that the 1882 Act would alter the reservation's boundaries and reduce the overall size of the reservation. HRA also analyzed whether the subsequent history and demographics of the area indicate that the land opened for settlement under the 1882 Act lost its Indian character and was no longer treated as if it were a part of the Omaha Reservation.

HRA conducted research in the following repositories:

- National Archives and Records Administration branches in Washington, D.C.; College Park, Maryland; and Kansas City, Missouri.
- The Nebraska State Historical Society in Lincoln, Nebraska.
- The libraries of the University of Nebraska in Lincoln, Nebraska.

In addition, HRA reviewed congressional records, the annual reports of the commissioner of Indian affairs, National Archives microfilm publications, survey

maps, land patents for the area west of the railroad, census data, and secondary literature.

The historical evidence indicates that Congress and the Omaha Tribe did intend to diminish the Omaha Reservation and alter the reservation's boundaries by severing the land west of the railroad right of way from the reservation pursuant to the 1882 Act. As early as 1871, the Omaha Tribe petitioned Congress to "separate" 50,000 acres from the western portion of the reservation for sale in order to generate funds for the tribe to improve the remainder of the reservation.[2] The Commissioner of Indian Affairs supported the tribe's request and informed Congress "that the general idea of *diminishing* these reservations for the purpose of securing a higher cultivation of the remaining lands is consonant with sound policy. . . ."[3] In Congressional debate over the 1882 Act, proponents of the legislation explained that the sale of 50,000 acres from the western portion of the reservation would, in fact, reduce the total size of

---

[2] Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs* , S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 3, serial 1481. The House of Representatives published an almost identical report as H. exdoc. 84, January 23, 1872, serial 1510.

[3] Emphasis added. Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs.* , S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 2, serial 1481.

the Omaha Reservation.[4] The Office of Indian Affairs (OIA, predecessor to today's Bureau of Indian Affairs) carried out the provisions of the 1882 Act, and the land west of the railroad was opened to sale in 1884, with the exception of certain tracts that Omaha Indians selected as allotments. All of the opened land was subsequently conveyed from the United States to non-Indians. Annual OIA reports did not include the 50,000 acres west of the railroad right of way in the reported acreage of the Omaha Reservation. A 1935 OIA report characterized the 1882 Act as a "reduction" of the reservation to the extent of 50,157 acres.

The history and demographics of the area opened for settlement under the 1882 Act indicate that this land, to the extent it ever possessed Indian character, lost that status long ago. The area west of the railroad right of way was almost exclusively settled by non-Indians. The percentage of Indian population west of the railroad right of way has consistently remained under two percent. West of the railroad right of way, all governmental services are provided by state and local agencies, not by the Omaha Tribe. Prior to the tribe's recent attempt to impose an alcohol tax and licensing scheme, the Omaha Tribe never asserted any tribal, governmental or sovereign jurisdiction west of the right of way, nor have significant numbers of Omaha tribal members settled in the area west of the right of way.

---

[4] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6538.

In 1989, Marcia Kimball of the U.S. Department of the Interior's Office of the Solicitor determined that the land west of the railroad right of way lacked Indian character and located the western boundary of the reservation at the centerline of the railroad right of way.[5] Similarly, the Thurston County District Court and the Nebraska Attorney General's Office have concluded that the land west of the railroad right of way is not part of the Omaha Reservation.[6]

It is my opinion, based on a reasonable degree of historical certainty, that both the Omaha Tribe and Congress understood and intended that the 1882 Act would diminish the Omaha Reservation and alter the western boundary of the reservation from its location as surveyed in 1866-67 eastward to the railroad right of way identified in the 1882 Act. The subsequent history and demographics of the area west of the railroad right of way support this conclusion. The Omaha Tribe never settled in nor exercised jurisdiction over the land west of the right of way. Both currently and historically, the area west of the railroad right of way has not been treated as if it were part of the Omaha Reservation, and the Omaha Tribe has not occupied or exercised any governmental, tribal or sovereign functions west of the right of way.

---

[5] Marcia M. Kimball, for the Field Solicitor, to Jerry Jaeger, Area Director, Aberdeen Area Office, June 27, 1989.

[6] *State v. Picotte*, Case No. CR 00-6, Docket 32 Page 363 (D. Ct. Thurston Co. Neb., Aug. 22, 2000), Nebraska Attorney General Opinion 07005, February 15, 2007.

This report addresses the following topics: creation of the Omaha Indian Reservation; sale of land and allotments made under the Act of June 10, 1872; sale of land and allotments made under the Act of August 8, 1882; settlement of lands west of the railroad right of way; government reporting of the Omaha Reservation's size; and present demographics of the area.

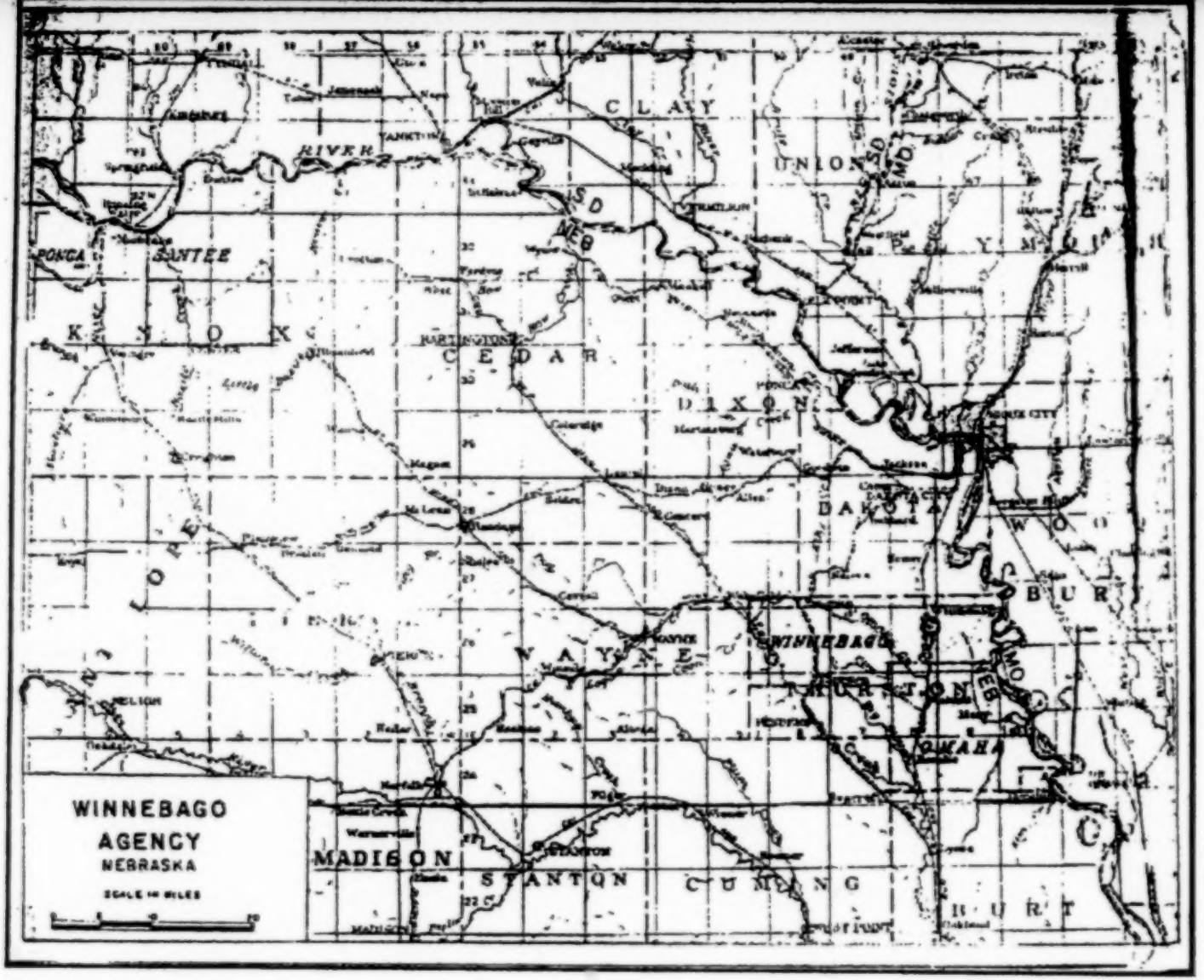


Figure 1. Undated map of the Winnebago Agency, showing the Omaha Indian Reservation; Pender, Nebraska; and the Chicago, St. Paul, and Omaha Railroad. (*Source*: File: Plat Books – Thurston + Burt Counties, Box 69, Records of the Winnebago Agency, Record Group 75, National Archive and Records Administration-Central Plains Region, Kansas City, Missouri.)

Federal Indian Policy and the Creation of the Omaha Reservation

Events involving the Omaha Tribe and the Omaha Indian Reservation took place against a backdrop of evolving federal Indian policy that promoted both the assimilation of Indians into mainstream American culture and the transfer of land from Indians to non-Indian settlers. The Omaha Indians arrived in the Prairie-Plains region as part of a larger migration of Siouan language speakers from the Ohio River Valley. By the early 1700s, the Omaha lived along the Missouri River where they developed a subsistence strategy that combined horticulture and bison hunting. By the early 1800s, the Omaha occupied an area west of the Missouri between the Niobrara and Platte rivers to the Sand Hills where their territory overlapped with that of the Pawnee Indians.[7]

After the American Revolution, Euroamericans began expanding westward into the Appalachian Mountains and the Ohio and Mississippi River regions. The federal government initially sought to remove Indians from areas being settled by Euroamericans.

---

[7] Margot P. Liberty, W. Raymond Wood, and Lee Irwin, "Omaha," *Handbook of North American Indians*, Volume 13: Plans, Part 1, volume editor Raymond J. DeMallie, general editor William C. Sturtevant (Washington: Smithsonian Institution Press, 2001), 399-401; David J. Wishart, *An Unspeakable Sadness: The Dispossession of the Nebraska Indians* (Lincoln: University of Nebraska Press, 1994), 6, 13-15; Alice B. Kehoe, *North American Indians: A Comprehensive Account*, second edition (Englewood Cliffs: Prentice-Hall, Inc., 1992), 303-305.

Policy makers thought it best for Indians and non-Indians to live apart, and they envisioned setting aside large tracts of land as perpetual Indian territory. Through negotiation and force, the federal government sought to remove Indians to designated areas west of the then-settled regions.[8]

As Euroamerican settlement encroached on land claimed by the Omaha and other tribes, the Omaha entered into "peace and friendship" treaties with the United States in 1815 and 1825.[9] The Omaha avoided removal by ceding their claims to lands east of the Mississippi to the United States in 1830 and 1836 which allowed the tribe to retain its land west of the Mississippi.[10] During the 1830s and especially in the 1840s, Euroamericans began migrating to present-day Texas, the Pacific Northwest, Utah, and California. They also pushed the line of more concentrated Euroamerican settlement west of the Mississippi.[11] A series of territorial acquisitions between 1845 and

---

[8] Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, abridged ed. (Lincoln: University of Nebraska Press, 1986), 64-65, 78-93; Paul Finkelman and Tim Alan Garrison, eds., *Encyclopedia of United States Indian Policy and Law*, vol. 1 (Washington, DC: CQ Press, 2009), 434-435.

[9] Treaty of July 20, 1815, 7 Stat. 129; Treaty of October 6, 1825, 7 Stat. 282.

[10] Treaty of July 15, 1830, 7 Stat. 329; Treaty of October 15, 1836, 7 Stat. 524.

[11] United States Department of the Interior, Geological Survey, *National Atlas of the United States of America* (Washington, D.C.: 1970), 138.

1852 expanded the United States all the way to the Pacific Ocean.

Territorial expansion and population growth changed the federal government's attitude toward Indians. Instead of trying to remove tribes to a perpetual Indian territory, policy makers sought to reduce tribes to small holdings within their traditional homelands. Federal officials negotiated treaties with tribes for large land cessions, leaving the tribes with "reservations" on which they could continue to live, under the supervision of federal Indian agents. Most of the treaties authorized the president of the United States to divide the reservations into individual or family allotments of land. Policy makers thought that reservations would serve as safe places where Indians could be educated to live more like Euroamericans.[12] Under this new policy, the United States and the Omaha entered into a treaty in 1854, ceding additional land and creating a reservation for the tribe.

By the late 1870s, it became increasingly clear that the federal government's existing reservation policy was unworkable. Indians were cut off from their customary resource areas, making it difficult for them to survive using traditional strategies. The

---

[12] David Rich Lewis, *Neither Wolf nor Dog: American Indians, Environment, and Agrarian Change* (New York: Oxford University Press, 1994), 15-16; Prucha, *The Great Father*, 113, 118-119, 181.

United States increasingly used military force to contain Indians on reservations and to gain additional cessions of Indian land. Furthermore, it stopped the practice of negotiating treaties with Indians in 1871, although it did continue to enter into "agreements" with tribes, to be approved by Congress.[13]

Humanitarian reformers, who considered themselves "friends of the Indian," began lobbying for policies aimed at teaching Indians how to live like Euroamericans, in hopes of making it possible for Indians to survive land and resource loss and assimilate into the mainstream economy and society. The reformers considered Indians primitive and doomed to die off unless they learned the arts of civilization. They called for replacing tribalism with individualism, nomadism with fixed-settlement agriculture, and collectivism with private property.[14]

Nineteenth-century Euroamericans valued agrarianism and self-sufficiency, even as Thomas Jefferson's ideal of a nation of yeoman farmers became increasingly unrealistic. Supporters of Indian policy reform touted agriculture as the highest and best use

---

[13] Act of March 3, 1871, 16 Stat. 544 at 566; Prucha, *The Great Father*, 164-166.

[14] Prucha, *The Great Father*, 198-210; Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Cambridge: Cambridge University Press, 1989 [1984]), 1-39; Emily Greenwald, *Reconfiguring the Reservation: The Nez Perces, Jicarilla Apaches, and the Dawes Act* (Albuquerque: University of New Mexico Press, 2002), 24-27.

of land, in some cases genuinely believing that family-based farming was the key to Indians' survival. In other cases, supporters of reform used agrarian rhetoric to justify further dispossessing Indian tribes, arguing that Indians would need less land as farmers, freeing up "surplus" land to be developed by Euroamericans. Both groups wanted to eliminate reservations: the former because they believed tribalism and collectivism held Indians back, and the latter because they believed reservations locked up land that could be put to productive use by non-Indians.[15]

The policy of allotment in severalty – dividing collectively held Indian reservations into individually owned parcels – proved to be a workable compromise between humanitarians who advocated Indian assimilation and those who wanted to develop Indian lands.[16] This alliance was not fully realized until 1887 when Congress passed the General Allotment Act, also known as the Dawes Act after Massachusetts Senator Henry Dawes, one of its key proponents. The Dawes Act called for reservations to be divided among individual Indians into allotments of land of a set

---

[15] Greenwald, *Reconfiguring the Reservation*, 18-24.

[16] Loring Benson Priest, *Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-1887* (New Brunswick, NJ: Rutgers University Press, 1942), 86-92, 164, 217.

size, and any leftover land would be opened to Euroamerican settlers.[17]

The 1882 Act at issue in this litigation was an important precursor to the Dawes Act. Alice Cunningham Fletcher, an ethnologist, arrived on the Omaha Reservation in 1881 to study the tribe, and she quickly became an advocate of the tribe's campaign for stronger titles to land. She helped the tribe petition Congress and secure passage of the 1882 Act, which combined allotment with land cession.[18] After her experience allotting the Omaha Reservation, Fletcher became an advocate of Indian policy reform and helped promote assimilation in general, as well as the Dawes Act in particular.[19]

The First Omaha Allotment

In 1854, the Omaha agreed to cede most of their territory west of the Missouri. They retained land north of the ceded area as a reservation, but the 1854 treaty provided that if they found the reservation unsatisfactory, the president could set apart a different area for them, either inside or outside the ceded area. The treaty authorized the president, at his

---

[17] Act of February 8, 1887 (General Allotment Act), 24 Stat. 388.

[18] Joan Mark, *A Stranger in Her Native Land: Alice Fletcher and the American Indians* (Lincoln: University of Nebraska Press, 1988), 64-77.

[19] Mark, *A Stranger in Her Native Land*, 103-107, 117-119.

discretion, to survey the reservation and to assign allotments of land to individual Indians who "are willing to avail of the privilege, and who will locate on the same as a permanent home. . . ." The president could also, at his discretion, issue patents to individuals for their allotments.[20] Ultimately, the Omaha selected a reservation within the ceded area, encompassing Blackbird Creek and stretching west and north of it.[21] It does not appear that the United States made any allotments pursuant to the 1854 treaty.

Under an 1865 treaty, the Omaha agreed to sell a portion of their reservation to the United States for $50,000, to be expended for the tribe's benefit. The government intended to settle the Winnebago Tribe on the ceded tract. The treaty provided for the remainder of the Omaha Reservation to be allotted in severalty. Unlike the 1854 treaty, which authorized the president to patent allotments to individuals, the 1865 treaty spoke of the allotments as assignments "for the exclusive use and benefit to themselves, their heirs, and descendants. . . ." The treaty further specified that the assigned lands "shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe. . . ."[22]

---

[20] Treaty of March 16, 1854, 10 Stat. 1043.

[21] Mark Awakuni-Swetland, "'Make-Believe White-Men' and the Omaha Land Allotments of 1871-1900," *Great Plains Research* 4 (August 1994): 203; Liberty et al., "Omaha," Fig. 1, 400.

[22] Treaty of March 6, 1865, 14 Stat. 667.

The General Land Office (GLO) conducted a survey of the Omaha Reservation in 1866-1867 in preparation for allotment, and the GLO commissioner approved the survey in 1867.[23] The 1865 treaty provided that heads of families would receive allotments of 160 acres and single adult males would receive 40 acres. The treaty did not provide for allotments to single women and did not take family size into account.[24] In 1868, Superintendent H. B. Denman of the Northern Superintendency reported that the Omaha would not agree to the 1865 terms and wanted to be issued allotments as specified in the 1854 treaty. Denman recommended that a new treaty be made authorizing allotments of 80 acres to each member of the tribe.[25] No action was taken on this recommendation, and the 1865 allotment terms remained in force. However, the Secretary of the Interior subsequently instructed that unmarried women aged eighteen or older would be given allotments of 40 acres, paralleling the provision for unmarried adult men, and the allotment process then got underway. Agent Edward Painter of the Omaha Agency reported in the fall of

---

[23] *Annual Report of the Commissioner of Indian Affairs for the Year 1867* (Washington: Government Printing Office, 1868), 270 [this series hereafter cited as *ARCIA* [*year*]]; see also, for example, township plats of Township 24 North, Range 5 East and Township 25 North, Range 5 East on Nebraska State Surveyor's Office website <ftp://ftp.sso.state.ne.us/maps/gloc/161.pdf and ftp://ftp.sso.state.ne.us/maps/gloc/163.pdf>.

[24] Treaty of March 6, 1865, 14 Stat. 667; *ARCIA 1869*, 344.

[25] *ARCIA 1868*, 227.

1869 that allotment was nearly finished.[26] By the time of his next annual report (August 1870), he had completed the work.[27] The Omaha received certificates for their allotments in March 1871.[28] The allotments were all in the eastern half of the reservation, suggesting that the tribe did not occupy and perhaps did not use the western part of the reservation at that time.[29]

The 1872 Land Sale

In August 1871, Agent Painter reported that in order to obtain financial resources to make improvements to the reservation, the Omaha chiefs appealed to Congress "to provide for the enactment of a law authorizing the sale of 50,000 acres of the most western portion of their reservation. . . ." Congress did not enact the proposed legislation, which Painter attributed to the fact that the bill included "other subjects not sufficiently matured for its favorable action." As a result, he noted, the Indians lacked funds to build houses and to farm their new allotments.[30] An October 1871 letter from various Omaha chiefs to the House and Senate "earnestly renew[ed]

---

[26] *ARCIA 1869*, 344.

[27] *ARCIA 1870*, 250.

[28] *ARCIA 1871*, 436.

[29] Awakuni-Swetland, "'Make-Believe White-Men' and the Omaha Land Allotments of 1871-1900," 210, 211.

[30] *ARCIA 1871*, 445-46.

the petition presented to Congress at its last session," calling for "the sale of as near 50,000 acres from the most western portion of our reservation as can be separated from the remainder by a line running along the section-lines from north to south," with the proceeds to be used for building houses and establishing farms.[31]

This time, Congress answered the tribe's request with the Act of June 10, 1872, authorizing the secretary of the interior, with the "consent and concurrence" of the Omaha Tribe,

> to cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south.[32]

The act called for the "lands so separated" to be appraised and advertised for sale by sealed bid, at not less than the appraised value for any given tract, with the proceeds to be put into an interest-bearing

---

[31] Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs . . .* , S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 3, serial 1481. The House of Representatives published an almost identical report as H. exdoc. 84, January 23, 1872, serial 1510.

[32] Act of June 10, 1872, 17 Stat. 391.

U.S. Treasury account for the Omaha Indians.[33] In a letter to the secretary of the interior recommending the legislation, which also called for the sale of land from several other reservations, Commissioner of Indian Affairs F. A. Walker explained, "I believe that the general idea of diminishing these reservations for the purpose of securing a higher cultivation of the remaining lands, is consonant with sound policy. . . ."[34] Omaha reservation Agent Howard White later reported that the Omaha had consented to the act.[35]

A commission was appointed to appraise the lands, and its appraisal report was approved in January 1873. The lands were advertised for sale by sealed bid, but only 300.72 acres were sold. Commissioner of Indian Affairs Edward P. Smith commented, "In view of the small number of bids received at this sale, it was deemed inexpedient to offer the lands again before next spring."[36] In November 1873, the GLO commissioner delivered two patents for land sold under the 1872 act, one to Nathan Houston and

---

[33] Act of June 10, 1872, 17 Stat. 391.

[34] Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs. . . .*, S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 2, serial 1481.

[35] *ARCIA 1872*, 213; see also *ARCIA 1873*, 20.

[36] *ARCIA 1873*, 20.

the other to Charles Hanshaw.[37] Hanshaw acknowledged receiving his patent on November 28, 1873.[38]

A tract book titled "Omaha Indian Reservation in Nebraska" showed only two landowners – Houston and Hanshaw – in the area sold under the 1872 act. The tract book appears to have been prepared in conjunction with the appraisal of land pursuant to the 1872 act. Nathan Houston purchased irregular lots on the western and southern edge of the sale area, just inside the boundary of the reservation as it was surveyed in 1866-1867. His purchases totaled 140.72 acres. Hanshaw purchased 160 acres, the northwest quarter of Section 29, Township 25 North, Range 6 East. The date of patent for both men was November 10, 1873.[39]

It is not entirely clear why more of the offered land did not sell. Samuel Janney, writing on behalf of a group of Quaker Friends, explained, "This result has been attributed by Superintendent White to the provisions of the law requiring 10 per cent in cash of

---

[37] Commissioner, General Land Office, to Commissioner of Indian Affairs, November 18, 1873, no letter number, Box 50, Special Case 46, Special Cases 1821-1907 [SC 46], Record Group 75: Records of the Bureau of Indian Affairs [RG 75], National Archives and Records Administration, Washington, D.C. [NARA I].

[38] Charles Hanshaw to Commissioner of Indian Affairs, November 26, 1873, no letter number, Box 50, SC 46, RG 75, NARA I.

[39] "Omaha Indian Reservation in Nebraska," Entry 458: Nebraska Tract Book, RG 75, NARA I.

the appraised value to be deposited with each bid, and for the payment in cash of the entire amount of sale on delivery of the deed."[40] Agent Painter, by contrast, said the minimum price of $2.50 per acre was "too high to meet the views of those desiring to make investments."[41] In fact, the act set a minimum price of $1.25 per acre, but it specified that "no sale shall be approved unless the average sales of each of said parcels of said land shall be at least two dollars and fifty cents per acre."[42]

Congress appropriated funds in 1874 to purchase additional land from the Omaha Tribe, not to exceed 20 sections, for the Wisconsin Winnebago Indians.[43] Barclay White, superintendent of Indian affairs for the Northern Superintendency, later reported that the Omaha "have sold nearly twenty sections of land to the Winnebagoes, the proceeds of which, applied to beneficial purposes, will probably be sufficient for their present needs."[44] A later source reported the figure as 12,374.53 acres.[45]

---

[40] House of Representatives, *Indians of the Northern Superintendency. Letter from Samuel M. Janney, on Behalf of Executive Committee of Friends, Relating to the Indians*, H. misdoc. 66, 43d Cong. 1st sess., January 12, 1874, 2, serial 1618.

[41] *ARCIA 1873*, 191.

[42] Act of June 10, 1872, 17 Stat. 391.

[43] Act of June 22, 1874, 18 Stat. 146 at 170.

[44] *ARCIA 1874*, 202.

[45] Annual Statistical Report for Omaha Reservation, Winnebago Agency 1935, 11, *Superintendents' Annual Narrative and*

(Continued on following page)

The 1882 Act

In April 1880, the Sioux City and Nebraska Railroad Company entered into agreements with the Omaha and Winnebago tribes for a railroad right of way running through their reservations. The agreement with the Omaha stated that the route would start where the Middle Creek intersected the northern boundary of the reservation, run down the Middle Creek valley to Logan Creek, and continue along the Logan Creek valley to the southern boundary of the reservation.[46]

Meanwhile, another bill to authorize the sale of the western portion of the Omaha Reservation (S. 1136) was introduced in the Senate.[47] The proposed legislation was almost identical to the 1872 act, "with one or two inconsiderable exceptions. . . ."[48] The Senate did not debate the bill until June 1880. During the floor debates, certain senators opposed a provision that allowed the land to be sold as a single tract of nearly 50,000 acres. The Senate recommitted

---

Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938, National Arrives Microfilm Publication M1011 [M1011], roll 170, frame 1118.

[46] Articles of Agreement, April 19, 1880, Letter No. 1880.591, Box 75, Special Case 100, Special Cases, 1821-1907 [SC 100], RG 75, NARA I.

[47] *Congressional Record*, 46th Cong., 2d sess., January 26, 1880, 10: 517.

[48] R. E. Trowbridge, Commissioner, to Secretary of the Interior, April 2, 1880, printed in *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4135.

the bill to the Committee on Indian Affairs, with a proposed amendment to remove the clause allowing the land to be offered as a single tract.[49] It appears that no further action was taken on this bill, and a new one was introduced at the next session of Congress. The Senate Committee on Indian Affairs considered the bill and reported it back with amendments in January 1881, but this bill also failed to progress further.[50] In April 1881, Frank Peavey offered to buy the entire 50,000 acres, but it does not appear that his offer was seriously considered.[51] The acting secretary of the interior subsequently pointed out that no funding existed at that time to cover the cost of selling the land, although it is not clear that he was responding specifically to Peavey's offer.[52] Another land sale bill introduced in December 1881 also stalled.[53]

At the same time, the Omaha were becoming increasingly concerned about the possibility they

---

[49] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4136.

[50] *Congressional Record*, 46th Cong., 3d sess., December 16, 1880, 11: 174; *Congressional Record*, 46th Cong., 3d sess., January 28, 1881, 11: 988.

[51] Frank H. Peavey to Samuel J. Kirkwood, Secretary of the Interior, April 1, 1881, Letter No. 1881.5686, Box 50, SC 46, RG 75, NARA I.

[52] Acting Secretary to Commissioner of Indian Affairs, June 2, 1881, Letter No. 1881.9424, Box 50, SC 46, RG 75, NARA I.

[53] *Congressional Record*, 47th Cong., 1st sess., December 7, 1881, 13: 48.

might be removed from their reservation. They witnessed the forced removal of the nearby Ponca Tribe in 1877, and when ethnologist Alice Fletcher arrived on the reservation in 1881 to study the Omaha, she learned of the tribe's ongoing preoccupation with the Ponca incident. As she later described it,

> [The Poncas'] distressing circumstances started the Omahas out of their feeling of security on their allotted lands. To make sure of their own land tenure, lest they too might suffer such an expulsion, some of the progressive men took their certificates of allotment, which they had always supposed to be patents, to a lawyer for examination. When the Indians heard that the certificate granted occupancy only, and gave no title to the land, not a thoughtful man among them but dreaded the morrow.[54]

Fletcher took up the Omaha cause, helping the tribe draft a petition, which fifty-three tribal members signed.[55] The petition asked Congress to grant each allottee "a clear and full title to the land on which

---

[54] Alice C. Fletcher, "Lands in Severalty to Indians; Illustrated by Experiences with the Omaha Tribe," *Proceedings of the American Association for the Advancement of Science, Thirty-Third Meeting, Held at Philadelphia, Penn., September, 1884* (Salem, Mass: The Salem Press, 1885), 659.

[55] Awakuni-Swetland, "'Make-Believe White-Men' and the Omaha Land Allotments of 1871-1900," 214.

he has worked."[56] Fletcher then lobbied Congress to authorize new allotments and trust patents to the Omaha.[57]

The Senate Committee on Indian Affairs reported a new land sale bill, S. 1255, to the Senate on February 20, 1882. Floor debates in the Senate suggest that S. 1255, like its predecessors, dealt only with the sale of the western portion of the reservation and did not include a provision for allotments and trust patents. The Senate passed the bill on April 20, 1882, and referred it to the House Committee on Indian Affairs.[58] On July 1, the House committee offered a substitute bill that authorized both the sale of land and allotment in severalty to the Omaha Tribe.[59] During the House debates, Representative Dudley Haskell of Kansas explained that the Omaha Tribe had a reservation of 150,000 acres[60] and wished to sell

---

[56] Senate, *Memorial of the Omaha Tribe of Indians, for a Grant of Land in Severalty*, S. misdoc. 31, 47th Cong., 1st sess., January 11, 1882, serial 1993.

[57] Francis La Flesche, "Alice C. Fletcher," *Science*, n.s., vol. 58, no. 1494 (August 17, 1923), 115.

[58] *Congressional Record*, 47th Cong., 1st sess., April 20, 1882, 13: 3079; *Congressional Record*, 47th Cong., 1st sess., May 12, 1882, 13: 3880.

[59] House, *Sale of a Part of Omaha Indian Reservation in Nebraska*, H.rpt. 1503, 47th Cong., 1st sess., July 1, 1882, serial 2069.

[60] Haskell incorrectly identified the size of the Omaha Reservation prior to the sale of the land west of the railroad right of way. The Senator subsequently corrected himself on the

(Continued on following page)

that portion lying west of the railroad "in order that a national fund may be created upon which they may draw." Haskell continued,

> Before any land is sold they are at liberty to make their individual selections of one hundred and sixty acres to every head of a family, eighty acres to every widow, and forty to every child. These severalty elections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to be issued in fee-simple. All the lands not allotted are to be patented under the broad seal of the United State to the tribe in common, so as to give them an absolute, indefeasible title to about 100,000 acres.[61]

On July 27, 1882, the House approved S. 1255 as amended (striking the Senate version and replacing it with the House version authorizing both the sale of land and the allotment of land to tribal members).[62] The Senate did not concur with the House and referred the bill to a committee of conference.[63] The

---

acreage, stating that after the sale, 143,000 acres would remain in the reservation. *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6539.

[61] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6538.

[62] *Congressional Record*, 47th Cong., 1st sess., July 27, 1882, 13: 6572.

[63] *Congressional Record*, 47th Cong., 1st sess., July 29, 1882, 13: 6628.

Senate subsequently withdrew its opposition to the allotment language, and President Chester Arthur signed the bill into law.[64]

The Act of August 7, 1882, (22 Stat. 341) provided for the survey and sale of land from the Omaha reservation as follows:

> That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary be, and hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company. . . .

After the appraisal, the secretary of the interior was "authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe." "Bona fide" settlers were permitted to purchase up to 160 acres of land at the public land office in Neligh, Nebraska. The act provided for payment to occur in three installments: one-third due one year after the date of entry, one-third after two years, and one-third after three years, with interest at 5 percent. It also authorized the appraisal and sale of any land within Township 24, Range 7 East that remained unallotted

---

[64] *Congressional Record*, 47th Cong., 1st sess., August 3, 1882, 13: 6842-6843; *Congressional Record*, 47th Cong., 1st sess., August 7, 1882, 13: 6998.

as of June 1, 1885, by the same terms as the land west of the railroad right of way.[65] Although the act did not say so explicitly, the provision regarding appraisal and sale of land in Township 24, Range 7 East appears to apply to unallotted land *east* of the railroad right of way.

The 1882 Act further provided for the allotment of the lands east of the railroad right of way. Section five of the act read, in part:

> That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one eighth of a section; to each orphan child under eighteen years of age, one eighth of a section; and to

---

[65] Act of August 7, 1882, 22 Stat. 341. Township 24, Range 7 East is bisected by the railroad right of way so that a portion of this tract lies east of the railroad right of way and a portion lies west.

> each other person under eighteen years of age, one sixteenth of a section. . . .

These allotments would "be deemed and held to be in lieu of allotments made under the 1865 treaty. Individuals would have a "preference right" to select their previous allotments if they had made "valuable improvements" to the land. Following allotment under the new act, all certificates issued under the 1865 treaty would be null and void.[66]

Following allotment, all unallotted lands east of the railroad right of way would be patented to the Omaha tribe in trust for twenty-five years. The government would continue to make allotments from this common land to any Omaha children born during the trust period. At the end of the trust period, the government would grant allottees fee patents to their individual lands and would also fee patent the common, unallotted lands to the Omaha Tribe.[67]

Under the terms of the act, the Indians could choose allotments either east or west of the Sioux City and Nebraska Railroad Company right of way.[68] Commissioner of Indian Affairs Hiram Price addressed this provision in his 1882 annual report:

---

[66] Act of August 7, 1882, 22 Stat. 341 at 342.

[67] Act of August 7, 1882, 22 Stat. 341 at 342-343.

[68] Act of August 7, 1882, 22 Stat. 341 at 343.

> By section 8 of the act the Indians are permitted, if they shall so elect, to select allotments within the tract designated to be sold, and while it is not thought that there are any who desire to make selections there, it might be well to ascertain their intentions in that respect, so that if there be any such they may make their selections and have them approved before the appraisement is begun.[69]

The secretary of the interior appointed Alice Fletcher a special agent on April 16, 1883, to carry out allotment of the Omaha Reservation under the terms of the 1882 Act.[70]

The Second Allotment and Land Sale

On April 21, 1883, Commissioner Price instructed Fletcher to proceed immediately to the reservation, where Agent George Wilkinson was seeking the tribe's consent to allotment. As soon as Wilkinson obtained the tribe's consent, Fletcher was to begin her work. Price said that as one of her first duties, Fletcher should determine whether any tribal members wanted allotments west of the railroad right of way, so that appraisal of land to be sold could move

---

[69] *ARCIA 1882*, LXVII.

[70] Hiram Price to Alice Fletcher, April 21, 1883, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, Alice Fletcher Papers, Papers of Alice Fletcher and Francis La Flesche [MS 4558], National Anthropological Archives, Suitland, Maryland [NAA].

forward.[71] Agent Wilkinson subsequently reported that the tribe had consented to the act on May 5, 1883.[72]

Commissioner Price wrote again on May 7, 1883, warning Fletcher that speculators might try to convince Indians to take allotments west of the railroad, "in order that tracts of extra value may be withheld from sale, and finally get into the hands of speculators." He again emphasized the need for Indians who wanted lands west of the railroad to select them right away:

> There must be no dilly-dallying on their part, and they will be given to understand that if they once make a selection west of the railroad they cannot afterwards give it up and take another allotment elsewhere, either east or west of the railroad. When they have once made a selection it must be final. They will not be allowed to select a tract west of the railroad, withhold it from sale, and after a while exchange it, or abandon it for one

---

[71] Hiram Price to Alice Fletcher, April 21, 1883, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA. See also Hiram Price, Commissioner, to George W. Wilkinson, U.S. Indian Agent, April 2, 1883, File: 064.3 Omaha Tribal 1883-1923, Box 56, Records of the Winnebago Agency, Accession 75-92-E-007, RG 75, National Archives and Records Administration-Central Plains Region, Kansas City, Missouri [NARA-CPR].

[72] George W. Wilkinson, U.S. Indian Agent, May 5, 1883, Letter No. 1883.8596, Box 50, SC 46, RG 75, NARA I.

> east of the railroad. But one allotment will be made to any one Indian.[73]

On May 14, Fletcher responded that she would "ascertain as speedily as possible" which tribal members wanted allotments west of the railroad and would "guard against the influences" of land speculators.[74] When Fletcher later relayed the request of Rosalie La Flesche Farley to exchange one of her children's allotments west of the railroad for a different tract, Price opposed it. He wrote, "If a precedent were once established, it would be difficult to foresee the end."[75]

On June 8, Fletcher reported on the Indians who chose allotments west of the railroad. That document has not been located, but a follow-up letter from Fletcher indicated that only the following Indians had selected land west of the right of way: Joseph La Flesche, Marguerite La Flesche, Ezra Fremont, and Lester Davis. Their selected lands fell in the portion of Township 24, Range 7 East that lay west of the right of way. (She listed one of the allotments as being in Township 27, Range 7, but that appears to have

---

[73] Hiram Price to Alice Fletcher, May 7, 1883, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS4558, NAA.

[74] Alice Fletcher to Hiram Price, May 14, 1883, Letter No. 1883.9302, Box 50, SC 46, RG 75, NARA I.

[75] Hiram Price to Alice Fletcher, September 14, 1883, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS4558, NAA.

been an error.)[76] Soon thereafter, Fletcher wrote to Commissioner Price about an allotment selection that contained a few acres west of the railroad right of way. She explained, "These few acres the allottee does not wish to relinquish and I have consequently written to the three commissioners asking them to except the land from appraisement."[77] At the end of 1883, the commissioner reported that only ten tribal members had taken allotments west of the railroad right of way.[78]

A few years later, Fletcher recalled,

> During the allotment, the Omahas were urged to take their land on the good prairie of the Western part of the reservation near the railroad, and all the best farming land in that region was allotted to individual Indians, to openly expressed disgust of persons who hoped to see these desirable sections left for white settlers.[79]

In a paper delivered to the American Association for the Advancement of Science, Fletcher explained that

---

[76] Alice Fletcher to Hiram Price, June 21, 1883, Letter No. 1883.11647, Box 50 SC 46, RG 75, NARA I.

[77] A. C. Fletcher to Hiram Price, July 23, 1883, Letter No. 1883.13564, Box 50, SC 46, RG 75, NARA I.

[78] *ARCLA 1883*, LXIII.

[79] Alice Fletcher to J. E. Rhoads, President Indian Rights Association, April 7, 1887, File: Outgoing Correspondence, 1884, 1886-1887, Box 2, Series 2: Outgoing Correspondence, MS4558, NAA.

she encouraged the Indians to select lands near markets and suited to agriculture. She succeeded in persuading a number of people to leave small, distant farms in favor of allotments near the railroad. She reported a total of 326 allotments (on both sides of the railroad) in the two townships through which the rail line passed.[80]

In his annual report for 1883, Commissioner Price noted that a three-person commission was appraising the land to be sold.[81] The commission submitted a schedule of the appraised lands on October 9, 1883, and Secretary of the Interior H. M. Teller approved it on November 20. Teller advised that the 50,157.27 acres were appraised at $512,670.27.[82]

In February 1884, Price replied to an inquiry from Fletcher "as to whether an Omaha Indian can become a settler and purchaser of land on that portion of the Omaha Reservation lying west of the Sioux City and Nebraska Railroad. . . ." He answered in the negative, citing language in the 1882 Act that

---

[80] Fletcher, "Lands in Severalty to Indians," 660.

[81] *ARCIA 1883*, LXII.

[82] *Description and Valuation of That Portion of the Omaha Reservation in Nebraska, Lying West of the Sioux City and Nebraska Railroad Right of Way* (Washington: Government Printing Office, 1883), Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA; H. M. Teller, Secretary, to Commissioner of the General Land Office, November 20, 1883, no letter number, Box 50, SC 46, RG 75, NARA I.

required such a settler to be a citizen of the United States. The Omaha Indians, Price noted, were not citizens and had no route to so becoming.[83]

Agent Isaiah Lightner of the Omaha and Winnebago Agency summarized the results of Omaha allotment in his 1884 annual report:

> . . . 75,931 acres were allotted in 954 separate allotments to 1,194 persons. This number includes the wives, they receiving their lands with their respective husbands. About 55,450 acres remain to be patented to the tribe, according to the act, for the benefit of the children born during the period of the trust patents.
>
> In the four townships nearest the railroad 326 allotments were taken, showing the practical appreciation by the people of a near market for their produce. In Township 24, Range 7 East, of the Sixth Principal Meridian, 105 allotments were made. The portion of this township lying west of the railroad and unallotted to the Indians was opened last April to white settlement and was immediately occupied. The unallotted portion of this township east of the railroad will next year be in the market, and the Indians located there will be surrounded by white neighbors,

---

[83] Hiram Price, Commissioner, to Alice Fletcher, February 21, 1884, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA.

> and thus be brought in close contact with civilized people.[84]

Commissioner Price reported that same year that the 954 allotments totaled 76,809.68 acres, 876 acres of which were west of the railroad.[85] Price also stated that following the approval of the appraisal schedule, "the General Land Office [was] directed to take steps for the disposal of the lands under the law. By public proclamation, dated March 19, 1884, the lands were thrown open to settlement from and after April 30, 1884 at 12 o'clock, noon." A total of 50,157 acres west of the railroad right of way were opened for settlement by non-Indians.[86]

Fletcher submitted the schedule of allotments and her final report to the Indian Department on June 25, 1884, and the department approved the allotments on July 11, 1884. On that same date, the department directed the GLO to issue patents for the allotments and forward them to the office of the commissioner of Indian affairs for distribution.[87]

In 1885, Omaha and Winnebago Agent George Wilson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken

---

[84] *ARCIA 1884*, 118

[85] *ARCIA 1884*, XLIX.

[86] *ARCIA 1884*, XLVIII.

[87] *ARCIA 1884*, XLIX.

allotments on the remainder."[88] Commissioner of Indian Affairs J. D. C. Atkins also referred to the lands west of the railroad as "recently sold under authority of [the 1882] act. . . ." He noted, however, that payment for the land had not proceeded according to the provisions of the act:

> Owing to the stress of hard times, and the failure to get returns from their crops in time, it was found that many of the purchasers would be unable to make their first payments at the date fixed by law. It was not deemed advisable to go to the expense of reselling the lands, and in light of past experience in similar cases it was believed that it would be more to the advantage of the Indians to extend the time of payment. The question having been submitted to the Indians as required, they readily gave their consent, and the extension was accordingly granted.
>
> All the lands lying west of the railroad, not previously allotted to the Indians, have been sold.[89]

The Act of March 3, 1885, authorized the extension of payment at the secretary of the interior's discretion "and with the consent of the Indians. . . ." The same legislation provided funds for the appraisal and sale of unallotted lands in Township 24 North, Range 7 East. Finally, the act authorized the secretary, with

---

[88] *ARCIA 1885*, 135.

[89] *ARCIA 1885*, LXII.

consent of the Indians, to appraise and sell to the highest bidder approximately 50 acres of land lying east of the railroad right of way, on the condition that the purchaser build and operate a flour mill on the site.[90]

Congress authorized extensions of payment again in 1886, 1888, 1890, and 1894.[91] The 1888 extension act also contained a provision regarding defaults on payment for land:

> The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act upon which the purchaser shall be in default, under existing law, for sixty days after the passage of this act, in payment of any part of the purchase-money, or in the payment of any interest on such purchase-money for the period of two years previous to the expiration of said sixty days. The Secretary of the Interior shall thereupon without delay cause all such land, together with all tracts of land embraced in said act not heretofore sold, to be sold by public auction, after due notice, to the highest bidder over and above the original appraisal thereof, upon the terms of payment authorized in said act. And the proceeds of all such sales shall be covered into the Treasury, to be disposed of

---

[90] Act of March 3, 1885, 23 Stat. 362 at 370.

[91] Act of August 2, 1886, 24 Stat. 214; Act of May 5, 1888, 25 Stat. 150; Act of August 19, 1890, 26 Stat. 329; Act of August 11, 1894, 28 Stat. 276.

> for the sole use of said Omaha tribe of Indians, in such manner as shall be hereafter determined by law.[92]

In other words, such lands would be reoffered for sale, rather than reverting to the tribe.

Records collected to date do not provide much detail about revenue generated through the sale of land west of the railroad. But a 1914 report from Commissioner of Indian Affairs Cato Sells to an Omaha delegation visiting Washington listed several per capita payments made to the tribe out of proceeds from land sales.[93] One of the statutes mentioned there, the Act of May 27, 1902, authorized a per capita payment to the Omahas, explicitly stating that it was to come from their Treasury funds "derived from the sale of their lands in Nebraska under section three" of the 1882 Act.[94]

In 1924, two Omaha delegates, on behalf of the tribe, asked how much land west of the Sioux City and Nebraska right of way had been sold.[95] The commissioner of the GLO answered that "50,157.24

---

[92] Act of May 5, 1888, 25 Stat. 150 at 151.

[93] Cato Sells, Commissioner, to Hiram Chase, Daniel Webster, Alfred Blackbird, and Amos Mitchell, March 13, 1914, 10-11, File: Land-Contracts 1913-1914, Box 44, Records of the Winnebago Agency, RG 75, NARA-CPR.

[94] Act of May 27, 1902, 32 Stat. 245 at 267.

[95] Elwood Harlan and Edward Cline to Commissioner of Indian Affairs, January 31, 1924, File: 8269-1924-Omaha-313, Box 95, Central Classified Files [CCF] 1907-1939, RG 75, NARA I.

acres were opened to homestead entry under the said acts of August 7, 1882 and March 3, 1883. Section 3 of the act of May 15, 1888 (25 Stat., 150), directed the Secretary of the Interior to declare forfeited all lands entered under said at upon which the purchasers were in default for 60 days after the passage of the act." The purchasers were given notice, and then the lands were declared forfeited and advertised for sale. The commissioner reported, "Public sales have accordingly been held and all the moneys for which the lands were sold have been paid."[96]

Subsequent Allotments

In 1893, Congress amended the act of August 7, 1882, allowing the secretary of the interior to allot each Omaha woman and each child born since allotment but before March 3, 1893, one eighth of a section (80 acres). In addition, any allottee who had received only a one-sixteenth section under the original act would receive another one-sixteenth section. The allotments were to come from "the residue lands held by that tribe in common."[97] Pursuant to the 1882 Act, these "residue lands" held in common were the

---

[96] Commissioner, General Land Office, to Commissioner of Indian Affairs, June 17, 1924, File: 8269-1924-Omaha-313, Box 95, CCF 1907-1939, RG 75, NARA I.

[97] Act of Marsh 3, 1893, 27 Stat. 612 at 630-631.

unallotted lands east of the railroad right of way.[98] This act was not carried out for a number of years.

On March 3, 1899, a number of Omaha Indians petitioned the secretary of the interior to allot their common lands, which lay east of the railroad right of way. The petition stated, "We have common lands to the amount of about 60000 acres and [it] is the source of continual unrest and dissatisfaction among ourselves." The petitioners explained that they wanted allotment to proceed, because after the trust period ended and their land became subject to taxation, the allotted land would be "the most stable and permanent source in sustaining us and our children in civilized life."[99]

Special Agent John Rankin began making the additional allotments in 1899, and by January 1900 he had made 800 new allotments covering 50,000 acres, primarily to women and children. The commissioner reported a total of 799 allotments.[100] A tract book listing these and some additional allotments shows only one lying west of the railroad right of way. The allotment in question, No. 221 to Fanny Frost, consisted of NE1/4 of SE1/4, Section 21 and Lot 3,

---

[98] Act of August 7, 1882, 22 Stat. 341, see Section 8.

[99] Petition of Omaha Indians to Secretary of the Interior, Mach 3, 1899, Letter No. 1899.17462, Box 153, Special Case 147, Special Cases, 1821-1907, RG 75, NARA I.

[100] *ARCIA 1900*, 275, 55.

Section 22 in Township 24 North, Range 7 East.[101] It appears that this land had been allotted to Marguerite La Flesche in 1884, but that allotment was cancelled.[102] Therefore, the additional allotments did not cover any new land west of the railroad right of way, just one preexisting allotment in that area. Many other allotments were made adjacent to but east of the right of way, indicating that the right of way served as the reservation boundary at that time.

A 1912 act of Congress authorized the sale of all remaining unallotted land on the Omaha Reservation, excluding several tracts reserved for the agency, a tribal cemetery, a church, and an old mission. The act also called for 164 acres being used by the agency to become a townsite, to be surveyed and platted so that town lots could be appraised and sold.[103] Congress amended this act in 1925, stating that the sale "shall not become operative so long as the need thereof exists of maintaining an agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska." The

---

[101] "Omaha Reservation," p. 51 [marked in red, upper left], Vol. 3, Indian Allotment Schedules, Nebraska, RG 49: Records of the Bureau of Land Management, NARA-CPR.

[102] "Omaha reservation land tract volume based on Act of Congress August 7, 1882 & March 3, 1893," p. 57, Records of the Winnebago Agency, RG 75, NARA-CPR.

[103] Act of May 11, 1912, 37 Stat. 111.

amendment also enlarged the reserved tracts and specified their locations.[104]

Settlement of the Opened Lands

When the area west of the railroad right of way was opened for settlement in 1884, it was quickly filled with non-Indian settlers.[105] The Indian agent for Omaha and Winnebago reported that the opened land west of the railroad "was immediately occupied."[106] W. E. Peebles purchased a tract of 160 acres, on which he platted the townsite of Pender. He also conveyed a portion of the land to the railroad for a depot site. Lots within the town went on sale in April 1885.[107] Between 1885 and December of 1889, Pender grew to a population of more than 300.[108] Thurston County was organized in 1889, encompassing the Omaha and

---

[104] Act of January 7, 1925, 43 Stat. 726.

[105] The annual report of the General Land Office noted, "Upon opening the lands to settlement the major portion thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." *Report of the Commissioner of the General Land Office*, 28, in *Report of the Secretary of the Interior*, vol. I, H.exdoc. 1, part 5, 48th Cong., 2d sess., 1884, serial 2286.

[106] *ARCIA 1884*, 118.

[107] "Pender Pan-O-Rama: Historical Souvenir Booklet," 1960, 4-5, Nebraska State Historical Society, Lincoln, Nebraska [NSHS]

[108] "Miscellaneous State Matters," *The Tribune*, McCook, Nebraska, December 17, 1885, n.p., Chronicling America: Historic American Newspapers, Library of Congress <http://chronicling

Winnebago reservations, along with the opened land west of the railroad. The *Daily Bee*, promoting Pender's candidacy for county seat in 1889, described the town as having a population of roughly 500 "bright, intelligent and wide awake public-spirited American citizens." The *Bee* praised Pender's location on the railroad and listed the following businesses: the Logan Valley bank, the Bank of Pender, the Logan Valley Times, the roller mills, "and several others." The town had a church, a school, and "[o]nly one saloon."[109] By the 1890s, Pender's population had grown to 700.[110]

The town continued to grow. A history of Pender prepared for the town's 75th anniversary compiled a list of the town's businesses in 1902:

> 4 elevators, 1 mill, 4 coal yards, 2 lumber yards, 6 general stores, 2 banks, 1 exclusive clothing store, 1 jewelry store, 1 grocery and jewelry store, 2 hardware and implement store, 2 livery barns, 2 hotels, 4 restaurants, 3 real estate offices, 2 drug stores, 1 exclusive millinery, 5 physicians, 2 harness shops, 4 saloons, 2 dentists, 1 veterinarian, 1 plasterer, 4 drays, 1 laundry, 3 barber shops, 1 tailor, 1 exclusive furniture [store] and undertaker, 2 news dealers, 2 bakeries, 1 cigar manufacturer, 2 broom manufacturers, 2 firms of live

---

[109] "The New Town of Pender," *The Omaha Daily Bee*, Omaha, Nebraska, April 6, 1889, 5, LOC-CA.

[110] "Pender Pan-O-Rama," 5, NSHS.

> stock dealers, 3 printing offices, 5 blacksmiths, 3 wagon shops, 1 fruit store, 2 meat markets, 2 bowling alleys, 2 plaining [*sic*] mills, 13 lawyers, 1 photograph gallery, about 1 dozen carpenters, several dress makers.[111]

A 1916 report on soils in Thurston County explained,

> The present population consists largely of native whites and Indians, except in the southwestern part, where Germans and Bohemians are numerically predominant. The Indians are in large part confined to the eastern part of the county.

It described Pender as an agricultural center, providing supplies for the region and serving as a shipping point for grain (the town possessed four elevators).[112] The population exceeded 900 by 1920, and between 1930 and 1950, Pender had about 1200 residents.[113]

All of the land west of the railroad right of way, apart from the handful of Indian allotments, was conveyed from the United States to non-Indians. The final remaining parcel – 134.85 acres – was sold in 1913.[114] The patent dates range from 1886 to 1921;

---

[111] "Pender Pan-O-Rama," 6, NSHS.

[112] U.S. Department of Agriculture, *Soil Survey of Thurston County, Nebraska* (Washington: Government Printing Office, 1916), 7.

[113] "Pender Pan-O-Rama," 5, NSHS.

[114] C. F. Hauke, Second Assistant Commissioner, to White Horse, Thomas McCauley, and Little Soldier, March 13, 1914,

(Continued on following page)

the majority of them were issued prior to 1900. The land allotted to Indians west of the right of way appears to have all been patented in fee simple by 1919, meaning that no trust land remained west of the railroad.[115]

Size of the Omaha Indian Reservation

Official reports from 1874 onward consistently treated the Omaha Reservation as having been diminished by 50,000 acres. In 1871, the OIA reported the size of the Omaha Reservation as 345,000 acres.[116] That figure changed to 200,000 acres in 1873.[117] In 1874, the commissioner of Indian affairs reported that the reservation contained 192,867 acres, but he continued, "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale in trust for said Indians, leaving 143,225 acres as

---

File: Land Allotment, Box A96, Records of the Winnebago Agency, RG 75, NARA-CPR.

[115] Cleone Timmerman, Registered Abstracter, conducted patent research for the entire area west of the railroad right of way in the Thurston County and Cuming County register of deeds offices. She located patents for all parcels west of the railroad. HRA reviewed Ms. Timmerman's work and confirmed her findings. There are a few minor discrepancies between the patents and the township plats. For example, Lot 11 (0.2 acres) in Section 26, Township 25 North, Range 6 East shows up on the township plat but is not found in any of the patents. All of the discrepancies involve very small lots and do not appear to be significant.

[116] *ARCIA 1871*, 684.

[117] *ARCIA 1873*, Table No. 80 (oversize foldout).

their diminished reserve."[118] Agent T. T. Gillingham, in his report for the Omaha Agency the following year, said that the reservation "comprises about 193,000 acres, including 50,000 acres offered for sale three years ago, but which failed to sell, and is now held in trust by the United States."[119] A table in the 1876 annual report listed the reservation as having 143,225 acres, continuing to treat the 50,000 acres as if it had been removed from the reservation.[120]

Although the OIA changed the reservation acreage slightly in 1884 to 142,345 acres, it did not include the 50,000 acres west of the right of way as part of the reservation.[121] In 1888, the OIA began reporting the reservation acreage in a different format, but the overall acreage of 142,345 remained the same and the 50,000 acres west of the right of way was not included in the reservation's total acreage. In the 1888 report, the OIA reported 65,191 "acres in reserve" with a footnote indicating "the residue" of 77,154 acres was allotted.[122] Those figures total 142,345 acres, the same number reported by the OIA since 1884, which did not include the 50,000 acres west of the right of way. The 1898 annual report listed the reservation "area in acres" as 64,558 with a note stating that this

---

[118] *ARCIA 1874*, 33.

[119] *ARCIA 1875*, 318.

[120] *ARCIA 1876*, 240.

[121] *ARCIA 1884*, 261.

[122] *ARCIA 1888*, 438.

acreage was unallotted and 77,786.63 acres were allotted (a total of 142,344.63 acres).[123] Like the prior reports, OIA's 1889 report continued to treat the 50,000 acres west of the right of way as having been removed from the Omaha Reservation.

Reports in the early twentieth century did not generally list the acreage for the whole reservation, providing statistics for tribal land and allotted land only. Therefore, it is difficult to discern how the OIA understood the reservation at that time. The allotments made in 1889 also triggered a more significant change in the reported reservation size. In 1900, the reservation was reported as 15,097 acres, and a comment indicated that this represented unallotted land. A total of 127,247.79 acres had been allotted by that time.[124] By 1906, 129,470 acres of the Omaha Reservation had been allotted, leaving 12,421 acres unallotted. The OIA changed the table heading by this time, so that instead of reservation area, it reported the area unallotted.[125] That practice continued through 1909, and the amount of unallotted Omaha land remained constant.[126] In 1911, the unallotted area was 4,500 acres.[127] That year, a new table showing "Area of Indian Lands" was added, including both allotted and unallotted lands. For the

---

[123] *ARCIA 1898*, 572.

[124] *ARCIA 1900*, 608.

[125] *ARCIA 1906*, 460.

[126] *ARCIA 1909*, 132.

[127] *ARCIA 1911*, 82.

Omaha Reservation, the figures were now 130,522 acres allotted and 4,500 acres unallotted, for a total of 135,022 acres.[128] The land west of the railroad right of way was not included as part of the reservation's total acreage.

In 1936, the Omaha Tribe of Nebraska organized a constitutional government under the provisions of the 1934 Indian Reorganization Act. Article I of the tribe's constitution defined its territory as "the present confines of the Omaha Reservation" and "any and all future additions of land acquired within or without said boundary lines by the Secretary of the Interior for the tribe or by the tribe, except as otherwise provided by law."[129] At that time, according to the annual statistical report for the Winnebago Agency, the Omaha Reservation encompassed 137,495.47 acres. The report indicated that the reservation's original acreage had been 300,000 acres, and it listed three "reductions" to the reservation, as follows:

- Sale to Winnebagoes, 1865, 100,000 acres;
- Sale to Winnebagoes, Act of June 22, 1874, 12,374.53 acres;
- Sale of land west of railroad, 50,157 acres.[130]

---

[128] *ARCIA 1911*, 94.

[129] *Constitution and Bylaws of The Omaha Tribe of Nebraska*, Approved March 30, 1936 (Washington: Government Printing Office, 1936), 1.

[130] Annual Statistical Report for Omaha Reservation, Winnebago Agency 1935, 11, M1011, roll 170, frame 1118.

The land remaining in the reservation in 1935 consisted of 2,000 acres of tribal land and 135,495.47 acres of allotted land. Of the allotted land, 108,510.71 acres had passed out of Indian ownership, 360 acres were owned by Indians with no trust restrictions, and the remaining 26,624.76 acres were held in trust for living allottees or the heirs of deceased allottees.[131]

Demographic History

Both historically and in recent times, the number of Indians west of the right of way has been extremely small compared to the number of non-Indians. This can be demonstrated by analyzing federal census information at the census-tract level (a sub-county unit termed a township or precinct). Original federal decennial census records are available for the years 1900, 1910, 1920, and 1930. These are the original forms completed by census takers, and they are organized by tract within a county. Census data for 1990 and 2000 is available on the U.S. Census Bureau's website. It includes compiled demographic data at the census-tract level. The U.S. Census keeps the underlying personal and household information confidential for 72 years following a decennial census. For that reason, the original census records from 1940 onward are not yet available, and it does not appear that compiled precinct-level data is available prior to 1990.

---

[131] Annual Statistical Report for Omaha Reservation, Winnebago Agency 1935, 13, M1011, roll 170, frame 1120.

The census tracts within Thurston and Cuming counties do not align perfectly with the railroad right of way (see the census tract maps in Appendix A of this report). For the purposes of this analysis, the townships within the historic Omaha Indian Reservation (as established by the 1854 treaty, minus portions sold for the Winnebago Reservation) were divided into those primarily west of the right of way and those primarily east of the right of way, as follows:

County	Townships West of ROW	Townships East of ROW
Thurston	Pender Thayer	Bryan Omaha Dawes Blackbird Anderson
Cuming	Grant Cleveland Bancroft	

For the 1900 to 1930 censuses, the original census records were reviewed and tallied by Indian v. non-Indian ancestry. For the 1990 and 2000 censuses, the American FactFinder website was queried to get compiled data for Indian v. non-Indian ancestry.[132] The totals are in Table 1.

[132] The American FactFinder website is maintained by the U.S. Census Bureau at http://factfinder2.census.gov/faces/nav/jsf/pages/index.html.

and Non-Indian Population East and West of Railroad Right of Way.

	Total	Non-Indian	Non-Indian %	Indian
urston – East of ROW	2361	1404	59.47%	957
urston & Cuming West of ROW	4374	4362	99.73%	12
urston – East of ROW	3778	2838	75.12%	940
urston & Cuming West of ROW	3957	3885	98.18%	72
urston – East of ROW	4399	3748	85.20%	651
urston & Cuming West of ROW	3846	3844	99.95%	2
urston – East of ROW	4841	3822	78.95%	1019
urston & Cuming West of ROW	4188	4153	99.16%	35
urston – East of ROW	3248	1365	42.03%	1883
urston & Cuming West of ROW	2624	2613	99.58%	11
urston – East of ROW	3349	1012	30.22%	2337
urston & Cuming West of ROW	2519	2498	99.17%	21

The percentage of non-Indian population west of the railroad line has remained high since the early twentieth century (see Table 2). Indians have comprised less than two percent of the population west of the right of way. The non-Indian population east of the railroad has fluctuated somewhat, rising in the first few decades of the twentieth century but dropping more recently. The reasons for these changes are not immediately evident in the records examined for this study.

Table 2. Summary, Percentage of Non-Indian Population by Decade.

	1900	**1910**	**1920**	**1930**	**1990**	**2000**
West of Railroad ROW	99.73%	98.18%	99.95%	99.16%	99.58%	99.17%
East of Railroad ROW	59.47%	75.12%	85.20%	78.95%	42.03%	30.22%

Current Treatment of Area West of Right of Way

The historical data indicates that the 50,000 acres west of the railroad right of way were separated from the Omaha Reservation and primarily settled by non-Indians. No evidence was found to suggest that the Omaha Tribe exercised jurisdiction over this area or otherwise treated the separated lands as if they remained part of the reservation. The present day administration and supervision of the area is consistent with the historical evidence.

In 1989, the Bureau of Indian Affairs asked the Office of the Solicitor of the United States Department of the Interior to locate the western boundary of the Omaha Indian Reservation.[133] In order to provide the opinion, Marcia Kimball of the solicitor's office reviewed "each of the treaties or legislative acts effecting [*sic*] the reservation" boundary. Kimball found that the land west of the railroad "appears to have lost its Indian character long ago with the arrival of non-Indian homesteaders." Thus, she concluded, "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way. . . . [U]nder the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for

[133] Marcia M. Kimball, for the Field Solicitor, to Jerry Jaeger, Area Director, Aberdeen Area Office, June 27, 1989.

settlement."[134] Similarly, the Thurston County District Court and the Nebraska Attorney General's Office have issued opinions concluding that the area west of the railroad right of way is not part of the Omaha Reservation.[135]

Current and past Omaha Tribal Council members were deposed as part of the current litigation between Pender and the Omaha Tribe.[136] Apart from the recent effort to impose the tribe's Beverage Control Ordinance, the deponents were not aware of any

---

[134] Kimball to Jaeger, June 27, 1989.

[135] *State v. Picotte*, Case No. CR 00-6, Docket 32 Page 363 (D. Ct. Thurston Co. Neb., Aug. 22, 2000); Nebraska Attorney General Opinion 07005, February 15, 2007.

[136] See Deposition of Mitch Parker, September 23, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Vince Merrick, October 23, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Amen Sheridan, November 5, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Jeff Gilpin, November 5, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Rodney Morns, November 5, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Sterling Walker, November 5, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Timothy Graft, November 5, 2009, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Barry Webster, January 18, 2010, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Eleanor Sauncosi Baxter, January 18, 2010, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); Deposition of Orville Cayou, January 18, 2010, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court); and Deposition of Omaha Indian Tribe (Amen Sheridan), April 1, 2010, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court).

other attempts to enforce tribal codes, ordinances, or regulations west of the railroad right of way. This includes the tribe's fire code, animal control ordinances, fireworks code, and wildlife and parks code, all of which have been enforced east of the right of way. Similarly, the Omaha Tribe has not provided any utilities, health care, or social services west of the right of way, although it does provide such services east of the right of way.

The extent of the tribe's governmental functions west of the right away appears to be some police patrols through Pender. Former officer Timothy Grant stated that if he had time, he would go to Pender on patrol "[b]ecause we had tribal members that frequented the bars over there."[137] On one occasion, the Omaha Tribal Police set up a safety checkpoint just outside Pender and conducted traffic stops, asking to see drivers' license and registration. The lieutenant governor of Nebraska and others showed up at the tribal council office the following day to protest the action.[138] The tribe has not conducted any traffic stops west of the right of way since then. Other than *State v. Picotte* and the attempted safety checkpoint, none of the deponents were aware of any specific situations in which Omaha Tribal Police

---

[137] Deposition of Timothy Grant, November 5, 2009, 18, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court).

[138] Deposition of Orville Cayou, January 18, 2010, 21, *Village of Pender v. Parker*, No. 08-002 (Omaha Tribal Court).

investigated crimes, made arrests or exercised independent authority west of the railroad right of way.[139]

The tribe has not sought to extend its business fees or licensing requirements west of the right of way. Nor does it operate any businesses in that area, according to the deponents. For a couple of years, the tribe had an agreement with the State of Nebraska to collect fuel taxes west of the right of way, but that is no longer in effect. Other than the Beverage Control Ordinance and the former fuel tax agreement, the tribe has not sought to impose any taxes west of the right of way. Neither does the tribe operate any tribal offices or conduct any tribal ceremonies west of the railroad right of way.

Conclusion

The western boundary of the Omaha Indian Reservation is the centerline of the abandoned Sioux City and Nebraska Railroad Company right of way. When the area west of the railroad right of way was opened for settlement, both Congress and the Omaha Tribe understood and intended that the sale of this land would diminish and reduce the overall size of

---

[139] Former Tribal Officer Sterling Walker recalled three or four times where Pender police officers requested that Officer Walker come to Pender to pick up tribal members. Deposition of Sterling Walker, 13-16. Former Tribal Police Chief Orville Cayou also once served a tribal arrest warrant at the Pender jail with the permission of the Thurston County Attorney. Deposition of Orville Cayou, 14-15.

the Omaha reservation. Following settlement of this area, the land west of the right of way was no longer treated as if it were a part of the Omaha Reservation and the land was settled almost exclusively by non-tribal members. The Omaha Tribe has not historically or currently exercised any degree of tribal, governmental, or sovereign control over this area, and the land has been treated as if it were no longer a part of the Omaha Indian Reservation.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

REPORT

ON

INDIAN AFFAIRS,

BY THE

ACTING COMMISSIONER,

FOR THE

YEAR 1867.

WHSL

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1868.

REPORT ON INDIAN AFFAIRS.

* * *

[260] NORTHERN SUPERINTENDENCY.

No. 78.

OFFICE SUPERINTENDENT OF INDIAN AFFAIRS,
NORTHERN SUPERINTENDENCY,
Omaha, Nebraska, November 1, 1867.

SIR: I have the honor, in compliance with the regulations of the department, to submit my first annual report of the condition of Indian affairs in the northern superintendency, together with the

accompanying reports of the agents and employés of the different agencies embraced within the superintendency.

I am gratified that it is in my power to report that the condition of all the tribes in this superintendency who live on reservations is in a high degree satisfactory. A large majority of the Indians of the Upper Platte agency, consisting of the Ogallalla and Brulé Sioux, Cheyennes and Arapahoes, who are known as Prairie or Blanket Indians, have been engaged for nearly two years past in a most determined and relentless war against the whites. From information gathered from the reports of those specially commissioned and authorized by the President to visit the Indian country, for the purpose of ascertaining the cause of this most bloody and formidable war, I am warranted in saying that it had its origin in the intense dissatisfaction created among the Indians by the endeavor of the government, without their consent, to open a new route leading from Fort Laramie northward to the gold districts of Montana and Idaho, and the location of military posts along the proposed route, to protect travel and emigration. This road passes through what is termed the Powder River country, and owing to the vast herds of wild game, such as buffalo, antelope, and deer, which range in this region, it is regarded by the Sioux Indians who live north of the Platte river as their best hunting ground, and the last one yet free from the encroachments of the white man

THE WINNEBAGOES.

This tribe of Indians, I am pleased to report, are now fast emerging from the sad and most unfortunate condition to which they were reduced by their removal from their homes in Minnesota.

Their present reservation, comprising 97,496.90 acres, (ceded to the United States by the Omahas, and by the United States to the Winnebagoes, under [261] treaty of March 8, 1865,) is well adapted in all respects for the future and permanent home of these Indians. Much of the land is of the very best quality, and no part of it is of an inferior grade. There are considerable bodies of timber, especially along the breaks of the Missouri river, and in the ravines which mark the reserve. The timber consists of oak, elm, walnut, soft maple, and cottonwood. The surface of the land is in general high rolling prairie, and particularly well adapted to raising cereals. The abundant crops of corn, wheat, and vegetables produced on the reservation the present year establish the fact that the land, for agricultural purposes, is not surpassed by any portion of the State of Nebraska.

The reservation is traversed by several creeks of pure living water, the valleys of which are remarkably fertile. I regard it as especially fortunate that these Indians have at last, after three years of wandering and tribulation, during which their number was greatly reduced by death, caused by privation and suffering, found so beautiful and fertile a resting-place. The fertility of the soil, the abundance of

timber and pasturage, and the eligible location of the reservation, give them ample opportunity to fully develop the decided taste and strong inclination they manifest for agricultural pursuits and the raising of stock.

The lands of their reservation have just been surveyed in the same manner as public lands, and the field-notes of the survey approved by the Commissioner of the General Land Office.

The agent this year has cultivated 500 acres of wheat, which he thinks will yield about 10,000 bushels, and about 330 acres of corn, which he thinks will yield 15,000 bushels. Aside from the land cultivated by the agent, the Indians have numerous patches of corn and vegetables scattered over the reservation.

The following buildings have been constructed this year on the reservation, under the supervision of the agent: an agency house, a storehouse for farming tools and the issue of rations, a building containing a council-room, an office, and storeroom for annuity goods, a carpenter's shop, a barn, and an interpreter's house.

There are now being constructed two dwelling-houses for employés of the agency, also a house for each one of the 14 chiefs of the tribe, as per article fourth of treaty of March 8,1865. The two houses for employés, and the 14 houses for the chiefs are being built under a contract made with the Messrs. Fuller & Puffer, of Nebraska, dated August 7, 1867, and will

all be completed and ready for occupation by the 1st of December next.

Under instruct:ons from the department, I purchased a saw-mill early in May last for the use of this tribe, and nearly all of the lumber used in building the above-named houses by the agent, and the houses for the employés and chiefs, was sawed by this mill from logs cut on the reservation, thus making the cost of these houses much less than if the lumber necessary for their construction had been purchased in the market.

I have also, in compliance with instructions, purchased the necessary machinery and gearing for a grist-mill, which is now being attached to the saw-mill, and will be ready to grind flour and meal by the 1st of January next. When this mill is ready for use, all the grain raised by the Winnebagoes can be made into flour and meal by their own mill, and while the mill is not employed in grinding grain belonging to the Indians, it can be used in grinding for the citizens of the surrounding country, they paying to the Indians the usual grain-toll.

Under an advertisement of the Hon. Secretary of the Interior, dated April 25, 1867, "for stock cattle for Indian service," by the terms of which I was authorized and instructed to receive the bids and let the contract, I made a contract with Mr. James P. Williams, of Kansas, dated June 1, 1867, to supply the Indian department with 1,000 head of milch cows and 30 head of bulls. Of this lot of cattle the Winnebagoes

have received 300 head of milch cows and 10 head [262] of bulls, at a cost of $33 33 per head; add to this number the cattle they had on hand, and it gives them a total herd of 444 head of cattle, nearly all of which are milch cows. With proper care and attention on the part of the agent, it is believed that this number of cattle will provide the Winnebagoes with a basis for raising all their work-cattle, and in a few years all the beef they will need.

I have instructed the agent to take charge of the cattle, and not to distribute them among the Indians until so ordered. This, in my judgment, is the best course to pursue until the Winnebagoes receive their lands in severalty. If distributed among them now, while they retain their tribal organization, and hold their lands and property in common, they will soon either kill or lose them, or trade them off to the whites. When each family is cast on its own resources by receiving its share in severalty of all the property now held in common, they will readily realize the importance and necessity of keeping it and properly caring for it, but not until then.

Under an advertisement dated April 23, 1867, made by me in compliance with instructions, I let a contract, dated June 5, 1867, to Mr. N. C. Howard, of St. Louis, Missouri, to furnish the Winnebagoes with 200 head of horses, at $49 80 per head. These horses have just been delivered at the agency, and are in all respects satisfactory to the Indians. Add the number delivered on this contract to those on hand, and it gives them a total of 480 head of horses.

Under an advertisement made by me, in compliance with instructions, I let a contract, dated June 10, 1867, to Mr. John A. Smiley, of Nebraska, to furnish subsistence to the Winnebagoes until the 1st day of June, 1868.

The abundant crops of wheat, corn, and vegetables raised on the reservation this year enabled me, in the month of September, to stop issuing to them rations of flour, and the only supplies now furnished by the contractor are, one-half pound of fresh beef to each individual per day, and 15 pounds of salt per month to the whole tribe. It will be necessary for the government to supply these Indians with a small ration of fresh beef until they raise meat enough for their own use.

It will be seen from the above recital that a great deal has been done by the government in the past .year to comply with the stipulations of the treaty of March 8, 1865, and to ameliorate the condition and advance the interests of this tribe, and I feel confident that by judicious management on the part of the superintendent and agent they will soon not only maintain and support themselves from the products of their own industry, but be so far advanced in the chief elements of civilization as to entitle them to all the privileges of citizenship.

In order to accomplish so desirable an end at the earliest possible day, I would earnestly recommend that the government pursue the following course:

First, allot to each head of a family in severalty 160 acres of good tillable land, and to each unmarried male or female 18 years of age 80 acres, embracing in every instance a sufficient quantity of timber to maintain each a homestead.

I would respectfully call your attention to the fact that there is no treaty provision authorizing an allotment in severalty of the lands belonging to the Winnebagoes. The only authority for such allotment is found in the fourth section of an act of Congress entitled "An act for the removal of the Winnebago Indians, and for the sale of their reservation in Minnesota for their benefit," approved February 21, 1863. This law restricts the quantity of land to be allotted to each head of a family to 80 acres, and makes no provision whatever for the unmarried males and females 18 years of age. You are aware that it has been the universal custom of the government in providing by treaty for an allotment of land in severalty to Indian tribes, to give to each head of a family at least 160 acres, and to each unmarried male and female 18 years of age at least 80 acres. In some cases a larger quantity is given to heads of families. (See treaty with Ottoes and Missourias, of March 15, 1854.)

Assuming that the Winnebagoes have in all 300 families, and their entire [263] reservation divided amongst them equally, each family would have over 320 acres of land. By allotting to each family 160 acres, and to each unmarried male and female 18 years of age 80 acres, more than one-half the

reservation would still be held in common. I can see no reason why the Winnebagoes should be limited to 80 acres of land to each family, while all other tribes have been allowed 160 acres or more. I would therefore respectfully recommend that Congress be asked to so amend the law referred to as to authorize the allotment to each family of 160 acres of land, and to each unmarried male and female 18 years of age 80 acres.

Many of this tribe while living in Minnesota held their lands in severalty and lived in good houses, and from their thrift and industry, and taste for agricultural pursuits and stock raising, had become independent and prosperous. They are all well pleased with their present reservation, and desire to make it their permanent home, and are exceedingly anxious to have a portion of it set aside in severalty, so that those among them who are disposed to be industrious, sober, and economical, may again have an opportunity of surrounding themselves with the comforts they once enjoyed, while the idle and vicious will be forced into habits of industry and self reliance.

Second, that Congress appropriates at its next session the sum of $70,000, to be expended in the purchase of work cattle, stock cattle, hogs and sheep, and the sum of $20,000 be expended in the purchase of wagons and farming utensils.

The Indian, in my opinion, can never, in any considerable degree be civilized, or educated to that condition of independence and enlightenment which

will fit him for the duties and responsibilities of citizenship, until he can with his own hands and through his own individual resources feed and clothe himself.

The Winnebagoes have entirely abandoned the chase as a means of subsistence, and from long residence and intimate associations with the whites of Minnesota, have gained a practical knowledge of farming and stock raising. They have raised a sufficient quantity of grain and vegetables on their reservation this year, to answer their purposes for the coming year, and there is every reason to believe that they will continue to raise their own breadstuff and vegetables in the future.

All that is wanting to make them independent of the government as regards subsistence is a sufficiency of meat. As they no longer procure meat by hunting for it, they must either go out among the whites and work for it, depend on the government for it, or raise it themselves. By furnishing them an abundance of stock cattle, hogs, and sheep, to breed from, I will venture the prediction that within two years from the day the stock reaches the reservation, they will raise meat enough to supply their own wants, and have a surplus for sale.

By sending one man among them familiar with the use of the loom, they will soon acquire a knowledge of the art of weaving, and in a very short time manufacture nearly all of their clothing from the wool of their own sheep.

After they have received their lands in severalty, each family should have their own work cattle, wagons, ploughs, and other necessary farming utensils; and I would therefore suggest that Congress at its next session appropriate not less than $20,000, to be expended, as I have before suggested, in the purchase of wagons and farming utensils.

The Winnebagoes have an abundance of money in the hands of the government, from which the appropriations I have named can be made. I would mention their "trust fund," amounting to $1,000,000, growing out of the treaty of November 1st, 1837, upon which they receive an annual interest of five per centum. In addition to this there is now, or soon will be, a surplus fund arising from the sale of their lands in Minnesota, after paying their indebtedness, as provided in the act of February 21, 1863.

It is also well known to the department that the entire expense of moving the Winnebagoes from Minnesota to Crow Creek, and from there to their present

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

REPORT ON INDIAN AFFAIRS

* * *

[264] . . . location in Nebraska, was paid out of their own money. The data by which the exact amount of this expenditure can be ascertained is in the possession of the department, and I would respectfully suggest that the government is honorably bound to return every dollar of it.

3. That the sum of six thousand dollars be appropriated by Congress, at its next session, for the purpose of paying the salaries of school teachers, purchasing furniture for school-house, school-books, and stationery.

In all of my councils with these Indians, they express an earnest desire to have schools established among them. They have had the benefit of schools for many years, but have been deprived of them since their departure from Minnesota. Their means are abundant, and a portion of them cannot be expended more judiciously than by inaugurating and maintaining one or two daily schools. These Indians seem to fully appreciate the importance of so far educating their children as to qualify them to read and write the English language. An ample appropriation was made for the construction of a large and commodious school-house in "An act making appropriations for the

current and contingent expenses of the Indian Department," approved July 26, 1866, but no steps have yet been taken to construct the building, because there was no appropriation made for the pay of teachers, purchase of school-house furniture, schools books, &c.

I would respectfully call your attention to the following appropriations made for the Winnebagoes by act of Congress approved July 26, 1866:

1. For the purchase of 400 horses, 100 cows, 20 yoke of oxen 20 wagons, and 40 chains, as per third article treaty of March 8, 1865, $60,300.

All of the above-named articles have been purchased for the Indians, and I presume the stock cattle, numbering 310 head, delivered to them under the contract of Mr. James P. Williams, were paid for out of this appropriation. Assuming this to be true, you will ascertain by estimating the cost of all of the horses, cattle, wagons &c., including the 310 head of stock cattle referred to, that there is now on hand unexpended of this appropriation, not less than $24,000.

2. For the erection of a house for each chief, as per fourth article treaty of March 8, 1865, $22,500.

Under the contract of Messrs. Fuller and Puffer, dated August 7, 1867, they agree to construct 14 houses for the chiefs of the tribe, and two houses for use of employés, and to furnish all of the material, except lumber, necessary to their construction, for the

sum of $5,127. All of the lumber used in building the chief's houses, except that used in ceiling them on the inside, was sawed by their own mill from logs cut on the reservation. The exact cost of the chief's houses I cannot determine until the bills for painting, hauling lumber, &c., come in, but I know it will not exceed the sum of $5,500, thus leaving a balance of this appropriation unexpended of about $17,000.

There will be on hand of these two appropriations, after complying with the stipulations of the third and fourth articles of the treaty of March 8, 1865, not less than $41,000.

I would therefore respectfully recommend that Congress authorize the diversion of the surplus of these two appropriations to the purchase of stock cattle, work cattle, hogs and sheep. If this is done the appropriations for these purposes, as herein suggested, can be reduced from $70,000 to about $29,000.

SANTEE SIOUX.

There is little to report in the way of progress among these Indians in the last year. In April, 1866, they were removed from Crow creek, Dakota, to their present location, near the mouth of Niobrara river, in Nebraska, and the hope was held out to them that the land selected for them at this point would, become their permanent home. A delegation of their chiefs visited Washington [265] last year, at the wish of the government, for the avowed purpose of negotiating a treaty and providing them with permanent homes.

The chiefs made known their earnest wishes to the government, and begged that a treaty might be made with them and a permanent reservation set apart for their use. Councils were held, but the winter was allowed to pass, and the Indians, after remaining in Washington from the middle of February to the 1st of May, returned to Nebraska without having accomplished anything for their good. This apparent indifference to their welfare has had the most demoralizing and depressing influence upon the whole tribe. They have now lost all hope of ever being restored to the favor of the government, and attribute the indifference of the government to a determination to make them suffer still longer for the crimes committed by their nation in Minnesota in the fall of 1862.

It is a well-known fact that those of the tribe, who were most prominent and influential in causing the outbreak in Minnesota and perpetrating outrages upon whites are still wandering or have become identified with the hostile Indians west of the Missouri.

It is also well known that the principal chiefs of the band now at the Niobrara reservation were active in not only trying to prevent the outbreak in Minnesota, but in saving the lives of the whites by giving them timely notice of the bloody purpose of that portion of the tribe who committed the outrages.

Hon. D. N. Cooley, late Commissioner of Indian Affairs, in his report for the year 1865, (see page 27,)

uses the following language in relation to these Indians. The only offence of which many of them appear to have been guilty is that of being Sioux Indians, and of having, when a part of their people committed the terrible outrages in Minnesota, taken part with them so far as to fly when pursued by troops. At all events, as soon as the troops came near enough to give them protection, they came in and brought with them, rescued from the horrors of Indian captivity, a large number of white women and children."

Agent Galbraith, in his report dated January 27, 1863, giving a full history of the outbreak, says: "Many of the chiefs, old men, and farmer Indians, remonstrated and even protested, but all was in vain; the die was cast, madness ruled the hour."

Of the eighteen hundred Indians who gave themselves up to Colonel Sibley after the outbreak, there is no evidence that any considerable number of them participated in the outbreak, but there is abundant evidence that many of them aided materially in saving the lives of the whites.

All treaties with these Indians have been abrogated, their annuities forfeited, their splendid reservation of valuable land in Minnesota confiscated by the government, their numbers sadly reduced by starvation and disease; they have been humiliated to the dust, and in all of these terrible penalties the innocent have suffered with the guilty. The good that can result from this course of retribution has been

realized ere this or it never will be. The loss of power, utter and complete humiliation and broken spirit of this tribe affords ample evidence that they have fully expiated their crime and will never again repeat it. Wisdom and humanity alike demand that the government should now adopt a different policy.

Take them once more by the hand, give them a permanent reservation, enter into treaty relations with them, restore enough of their former annuities to enable them to buy some of the necessaries of life, restore their school fund, purchase for them stock, cattle, hogs, and sheep, give them farming utensils, and provide for an allotment of whatever lands may be assigned them severally.

It must be borne in mind that these Indians are as far advanced in a knowledge of farming and stock raising as the Winnebagoes, and like them have abandoned the chase as a means of subsistence. They are considered the most intelligent and best educated Indians of the west, and take great pride in their schools, and religious missions.

[266] There is every reason to believe that if the government will pursue towards the Santee Sioux the policy I have indicated, they will, in a very few years, become good citizens and be entirely self-sustaining.

By reference to the accompanying annual report of Agent Stone and the reports of Rev. S. D. Hinman and Rev. John B. Williamson, resident missionaries among them, you will observe that they attribute the general demoralization and disinclination to labor

which now exists in this tribe, to the fact that they feel and realize keenly that they have no fixed home, nothing they call their own; that they are wanderers, with the shadow of the displeasure of the government resting upon them, and may at any time, without their consent, be removed to some new locality. The agent and missionaries unite in the opinion that these evils cannot be corrected until the Indians are located on a permanent reservation guaranteed to them by treaty.

In order that a suitable reservation might be selected for the Santee Sioux, the President, by proclamations, dated respectively, February 27, 1866, and July 20, 1866, withdrew from market the following described territory situated in the northeastern corner of Nebraska:

Townships 31, 32, and 33, range No. 5.

Townships 31 and 32, range No. 6.

Townships 31 and 32, range No. 7.

Townships 31 and 32, range No. 8.

Containing in all 148,606.17 acres.

Last winter, in compliance with instructions, I visited the Santee Sioux agency, and carefully examined the above described territory, with a view of ascertaining whether in my opinion it was suitable for a permanent reservation.

I found the location a desirable one, bounded on the north and west by the Missouri and Niobrara rivers, embracing a large quantity of tillable land,

and an unlimited range of pasturage, the only drawback being the scarcity of timber. With a view of adding to the amount of timber, I recommended that township No. 32, range No. 4, together with sections Nos. 7, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33, in township No. 33, range No. 4, be withdrawn from market, and the boundaries of the proposed reservation be readjusted so as to include the above. (See report dated January 8, 1867.)

I also recommended that township No. 32, range No. 6, be stricken from the proposed reservation, for the reason that the title to about 4,000 acres of this township is held by individuals, some of whom live on the land.

The majority of the Indians are well pleased with this location, and only ask that it be set apart to them as a permanent reservation guaranteed by treaty.

The Santee Sioux reached their present location too late in the spring of 1866 to enable them to plant and raise crops of corn and vegetables; therefore they have been subsisted by the government during the past year, under a contract with F. I. Dewitt, dated October 16, 1866.

Last spring the agent planted 195 acres of corn and five acres of potatoes and other vegetables. The crop of corn was most promising, and the agent estimated the prospective yield at 5,700 bushels, but late in the month of August the crop was almost entirely destroyed by grasshoppers, and the agent, in his report for the month of August, says that "there

will not be to exceed 200 bushels of sound corn, and the potatoes will not make good the seed planted."

The destruction of their crops will make it necessary for the government to continue to subsist these Indians as heretofore, and I would respectfully ask that an appropriation of $50,000 be made by Congress for that purpose.

There are two schools maintained among these Indians by religions missions, one under the charge of Rev. John P. Williamson, who represents the Methodist board of missions, the other under the charge of Rev. Samuel D. Hinman, representative of the Episcopal board of missions. Their reports, which are [267] herewith transmitted, will show the condition and progress of the respective schools. Mr. Williamson is teaching 80 scholars, and Mr. Hinman 221 scholars.

Mr. Williamson, for the want of a suitable building, is obliged to teach the children in tents. Mr. Hinman, in behalf of his mission, is now building a schoolhouse which he thinks will be large enough for his school. The government has contributed $3,000 to the mission to aid in building this school-house.

In order that every encouragement may be given the cause of education, and that the religious missions may not be disheartened in their laudable work, I would respectfully recommend that the sum of $7,000 be appropriated by Congress to construct school-houses for this tribe.

Under instructions, I have purchased for the Santee Sioux 140 head of fine horses, at a cost of $68 57 per head. The horses were purchased at Leavenworth City, Kansas, and driven to the agency. In driving them up three head were lost. Agent Stone, in his report for the month of August, says, "The Indians were very much pleased with the horses and expressed their regret that there were not more of them. I think they should be furnished with 1.50 or 200 more, so as to give one horse to each lodge." I approve of the recommendation of Agent Stone, And would therefore respectfully recommend that Congress would appropriate the sum of $9,000 to purchase horses for them.

Under the contract of James P. Williams, dated June 1, 1867, the Santee Sioux received about 300 head of stock cattle. The exact number delivered to them I will not know until the receipts of the agent are received. Nearly all of these cattle are young cows of good stock, well calculated to breed from, and, under judicious management on the part of the agent, will rapidly accumulate.

In order that these Indians may, at the earliest possible day, become self-supporting, I would respectfully recommend that the following appropriation be made by Congress for the purchase of stock: $8,000 for the purchase of stock cattle; $2,500 for the purchase of stock hogs; $6,000 for the purchase of stock sheep. Add the stock purchased with this money to that which they have on hand, and in two years they will raise more meat than they can consume. The

money expended in the past year for meat alone to subsist these Indians, if properly invested in stock cattle, hogs, and sheep, would have furnished them with a basis from which they could, in one year from the receipt of the stock, raise meat in abundance for their own use.

In addition to the appropriations hereinbefore recommended, I would respectfully recommend the following:

Clothing and cooking utensils	$12,000
Erecting agency buildings	12,000
Ploughing and fencing land	5,000
Pay of employés	6,000
Fifty sets of single harness for Indians	900
Agricultural implements	2,000
Seed wheat and potatoes	200
For iron and steel	1,200
Blacksmith's tools	300
Two span of horses for use of agency	800
Two sets of double harness for use of agency	100
For the purchase and erection of a steam saw mill on reservation	6, 000

The total appropriation asked for in this report is $129,000. This may seem extravagant, but when it is considered that it contemplates not only the feeding and clothing of these Indians for one year, but the erection of agency building, saw-mill, school-house, the breaking and fencing of land, purchase of farming utensils, including the purchase of stock cattle, hogs, and sheep, I do not think the sum asked for will be considered too large.

If it is the wish of the government to give to the Santee Sioux a permanent [268] reservation and place them on a footing which will in a few years render them entirely independent of the government, I cannot see how the work can be successfully inaugurated for a less sum.

UPPER PLATTE AGENCY.

Prior to the existing war, the Indians of this agency numbered 1,000 lodges, averaging six souls to the lodge, namely: 350 Ogallallas, and 350 Brulé Sioux, 150 Northern Cheyennes, and 150 Northern Arapahoes, and were divided into ten or twelve different bands, but since this war they have united their forces and remain more together. The Sioux remain, at this date, about the same in number, say 700 lodges, while there are but 100 lodges of Cheyennes and 60 of Arapahoes; they may be classified as follows:

O-yoke peh. – Chiefs, the Flying, Feather, Red Fox, the Shaker, and Red Dog; number, 100 lodges.

Bad Faces. – Chiefs, Brave Bear, Trunk, Red Cloud, and Black Twin; number 45 lodges.

Honc-pah-te-lah. – Chiefs, Man Afraid of his Horses, Fool Horse, and Yellow Eagle; number, 35 lodges.

The above are the Northern O'Gallallas and range on Powder river and vicinity, now hostile.

The Cut-Off bands and numerous small bands. – Chiefs, Big Head, The One who Walks under the Ground, Little Dog, Pawnee Killer, Standing Cloud, Big Mouth, Blue Horse, and Black Water Bonnet; number, 170 lodges.

These bands range south on the Republican and vicinity, and are known as the Cut-Off band. A few others, however, are mixed in with them.

The Orphan's band. – Chiefs, Iron Shell and Dog Hawk; number, 50 lodges.

Wah-ja-geh Brulés. – Chiefs, Red Leaf, Black Horn, Lancer, and Pretty Voice Orow; number, 100 lodges.

These two Brulé bands generally range north, but recently Dog Hawk joined Spotted Tail, and Iron Shell remains with the northern Indians on Powder river.

Those who form the Ring and Corn bands united; the former chiefs were Little Thunder and Grand Partisan, but now their authority has reverted to Chiefs Spotted Tail, Swift Bear, Two Strike, Standing Elk, and Fire Thunder; number, 200 lodges.

This band of Brulés, the largest in the agency, range on the Republican and vicinity, are friendly, and known as the Southern Brulés.

Northern Cheyennes. – Chiefs, Little Wolf and Fire Dog; number, 100 lodges.

Northern Arapahoes. – Chief, Black Bear; number, 60 lodges.

These two small bands are allied to the Powder river Sioux, and have lived in that country for many years.

These Indians, as classified, are to some extent mixed up. A few Brulés and Ogallallas of the north are now south, and about the same number of the southern Indians are north. The band known as the Laramie Loafers (and included in the above estimate) are fragments from all the different bands. Big Mouth, Blue Horse, and several others, who are now at North Platte, are Indians belonging to the Bad Face band, but since this war have broken off from their people.

The foregoing statement, giving the number of Indians belonging to this agency, the names of principal chiefs and their bands, and the country in which they range, was furnished me by Colonel G. P. Beauvais, (special Indian commissioner.) His thorough knowledge of these Indians, derived from a residence of many years among them as trader, warrants the belief that this information is obtained from the most reliable authority.

[269] Nearly all of the Indians of this agency have been engaged in active hostility against the government for the last two years.

In the spring of 1866, a commission was appointed by the President to negotiate a treaty of peace with

them. In the report made by the commission after concluding their labors, they say, "It will be seen that the results of the commissioners' labors are, a treaty entirely concluded with the Ogallalla and Brulé Sioux, one negotiated and partly perfected with the Cheyennes, and a favorable prospect of making a treaty with the Arapahoes."

The council at which these treaties were negotiated was held at Fort Laramie in July, 1866. The main object sought to be accomplished by the commissioners was the opening of a new route from Fort Laramie to Montana, via Bridger's ferry, and the head-waters of the Powder, Tongue, and Big Horn rivers. This region of country is highly prized by the Indians who occupy it, as it abounds in buffalo, antelope, and deer. Those of them who did not live in this region willingly signed a treaty granting the right of way, but those who did absolutely refused to allow a road to be made or military posts established.

While the commissioners were negotiating a treaty at Laramie, Colonel H. B. Carrington, 18th United States infantry, arrived with a force of about 700 men, with instructions from military headquarters to establish and occupy military posts on the proposed route to Montana. When Red Cloud, The Man Afraid of his Horses, and other principal chiefs of the bands occupying the Powder river country, learned that it was the determination of the government to establish military posts in their country, whether they consented or not, they at once withdrew from the council; and, with their followers, returned

to their country and commenced a vigorous war upon all who came into it or travelled the proposed route to Montana.

A small portion only of the Indians who it is claimed, were represented at the Laramie treaty, have remained true and peaceful. Some Ogallallas under Big Mouth remained in the vicinity of Laramie, and about 1,200 Brulés and Ogallallas, under the chiefs Spotted Tail and Swift Bear, went to the waters of the Republican river, south of the Platte. It is estimated that the Indians occupying the country north of Laramie, from the 1st of July, 1866, to the 21st of December, 1866, (the day Lieutenant Colonel Fetterman, with his command of 80 officers and men, were massacred,) killed 91 enlisted men and five officers of the army, killed 58 citizens and wounded 20 more, besides capturing and driving away large numbers of horses, mules, and cattle.

In February, 1867, the President appointed a commission, composed of two officers of the army and four civilians, to visit the Indian country in the vicinity of Fort Phil. Kearney, and learn all the facts relative to the massacre of Colonel Fetterman and his command, and to do all in their power to separate the friendly from the hostile Indians.

On the 19th of April they met a large delegation headed by Spotted Tail and Swift Bear. These Indians had faithfully adhered to the stipulations of the treaty signed by the chiefs at Laramie in July, 1866, and had not molested or disturbed the whites. After a

satisfactory council, they distributed among them $4,000 worth of presents, and assigned to them as a hunting ground the country lying between the Platte and the Smoky Hill rivers.

On the 12th of June, 1867, two of the commissioners, General Sanborn and Colonel Beauvais, held a council at Laramie with chiefs and headmen claiming to represent 200 lodges of the hostile Ogallalla and Brulé Sioux, among whom was The Man Afraid of his Horses, (a brave and influential chief.) They told the commissioners that the northern Indians had abandoned war, and that they would come in and join the friendly Indians under Spotted Tail.

They, however, expressed great anxiety to get powder from the commissioners, but it was refused. From all that has transpired since this council, it is believed [270] the only object the Indians had in meeting the commissioners was to obtain powder and lead with which to continue and wage a more vigorous war.

On the 2d of August, 1867, a large force of Sioux Indians, numbering, it is believed, full 3,000 warriors, made a desperate assault on Major Powell and a small command, while they were guarding a wood camp in the vicinity of Fort Phil. Kearney. Fortunately Major Powell was protected partly by a corral formed of wagon beds, and had it not been for a timely re-enforcement of troops from the fort, few, if any, of his party would have been left to tell the tale.

His loss was one officer (Lieutenant Jenness) and five men killed.

From the fierce and determined spirit manifested by the Indians in their effort to drive the white man from the region north of Laramie, known as the Powder river country, it is plain that the government will be compelled to adopt one of two alternatives: either make a treaty, giving up to them the exclusive occupation of the country referred to, and remove the military posts established there, or send troops enough into the field next spring and summer to scour the whole country, and either exterminate the greater part of the hostile Indians or drive them from it

The commission appointed by the President under the act of July 20, 1867, have sent out messengers, inviting the chiefs and headmen of these hostile bands to meet them at Laramie during the present month. There is little doubt that a treaty, satisfactory in its terms to the government and the Indians, will result from their councils. Unless the proposed treaty is in all respects satisfactory to the Indians, we will witness with the coming of the spring grass a renewal of the horrors of the past year.

It gives me great pleasure to report that Spotted Tail, Swift Bear, Standing Elk, Big Mouth, Blue Horse, and the Indians under them, have remained faithful to their pledges of peace made at Laramie in July, 1866, and that they have exerted their influence with their brethren who are at war to induce them to

meet the commission, enter into a treaty, and abandon the war path.

As the commission referred to is fully authorized to supply all the wants of these Indians, and to make every necessary arrangement for the future, I deem it unnecessary to make any recommendation.

OMAHAS.

The Omahas are the most thrifty, independent, and self-reliant tribe of Indians in the northern superintendency. Their reservation contains 205,304 acres. The surface of the land is, in general, high rolling prairie, the soil of the first quality. It is watered by numerous small creeks and branches, tributaries of the Missouri river. The timber is abundant, standing in detached bodies, and consists of cottonwood, oak, elm, walnut, and soft maple, affording ample material for building purposes, fencing, and firewood.

The lands embraced in the reservation reserved by the Omahas, under the first article of the treaty of March 16, 1854, cover an area of about 302,800 acres. Under the first article of the treaty of March 6, 1865, the Omahas sold to the United States, of this land, about 97,496.90 acres, for the purpose of locating the Winnebagoes, which leaves them now with a reservation containing about 205,304 acres. It would be difficult to find in the whole west a tract of country, of the same area, embracing a larger quantity of tillable land, good timber, and pasturage. The survey of their

reservation has just been completed and the returns approved by the Commissioner of the General Land Office.

Provision is made in the fourth article of the treaty of March 6, 1865, for an assignment of a limited quantity of their lands in severalty to the members of the tribe, including their half or mixed blood relatives residing with them, and instructions have been given to their agents to proceed and make the allotment without delay.

[271] In consideration of the cession of land upon which to locate the Winnebagoes the United States agreed to pay the Omahas the sum of $50,000, to be expended by the Commissioner of Indian Affairs for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking of land, and other improvements on the reservation.

Under instructions bearing date of July 22, 1867, about one-half of this sum was expended by me in the purchase of the following articles, all of which have been delivered to the agent: 50 wagons, 50 sets of double harness, 60 yoke of oxen, 40 two-horse ploughs, 40 one-horse ploughs, 2 mowers, 1 mower and reaper combined, 60 ox yokes with bows, 100 ox chains, 2 breaking ploughs, 10 large cook stoves, 30 Lancaster purcussion rifles, 20 Lancaster flint lock rifles, 10 Colt's revolvers with accoutrements, 60,000 pounds of flour, 5,000 pounds of bacon, 2,000 pounds of coffee, and 3,000 pounds of sugar.

I cannot now state the exact cost of these articles, but I feel confident it will not exceed the sum of $25,000.

I have instructed the agents not to distribute the wagons, cattle, harness, and farming implements, until the allotment of land in severalty is consummated.

Under article third of the treaty of March 6, 1865, the United States agreed to pay the Omahas the sum of $7,000 as damages, in consequence of the occupation of a portion of the Omaha reservation (not ceded) and use and destruction of timber by the Winnebagoes while residing thereon. This gives them a total of about $32,000 cash unexpended under the treaty of March 6, 1865. This sum will go far in purchasing for this tribe any additional farming implements, wagons, and work cattle they may need after receiving their land in severalty.

The total population of the Omahas is 995. After making the allotment of lands in severalty as provided by the treaty of March 6, 1865, it will leave a very large portion of their rich reservation untouched. From its desirable location and fertility of soil, this land will at any time sell for a good price, giving the Omahas an abundance of means with which to surround themselves with all the comforts of life and elements of civilization.

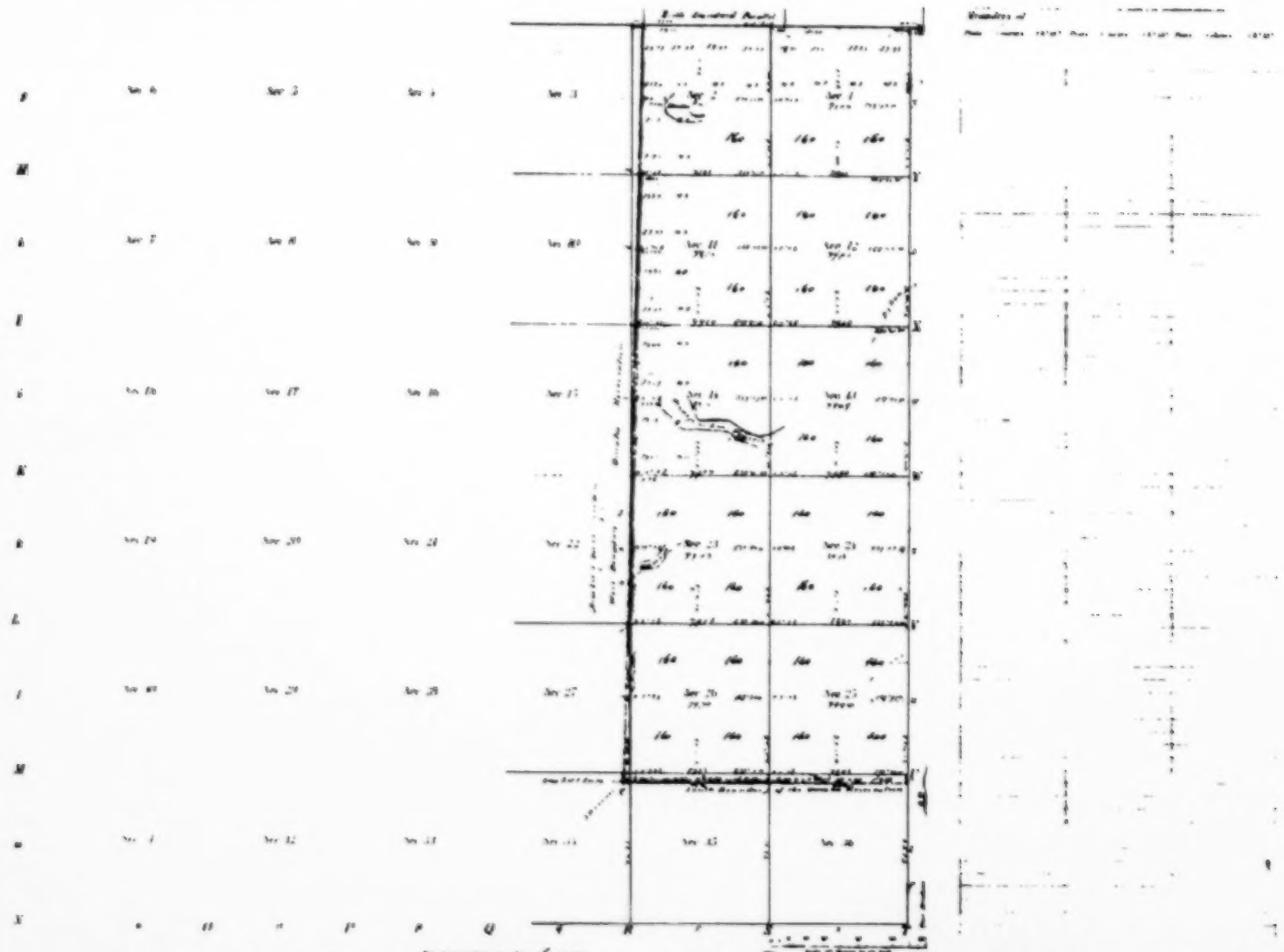
Of the stock cattle delivered under the contract of James P. Williams, dated June 1, 1867, the Omahas received 103 head, to which add the cattle on hand

before delivery of the above, and the 60 yoke of work cattle purchased for them by me during the fall, and it gives them a total head of 130 head of work cattle and 183 head of stock cattle.

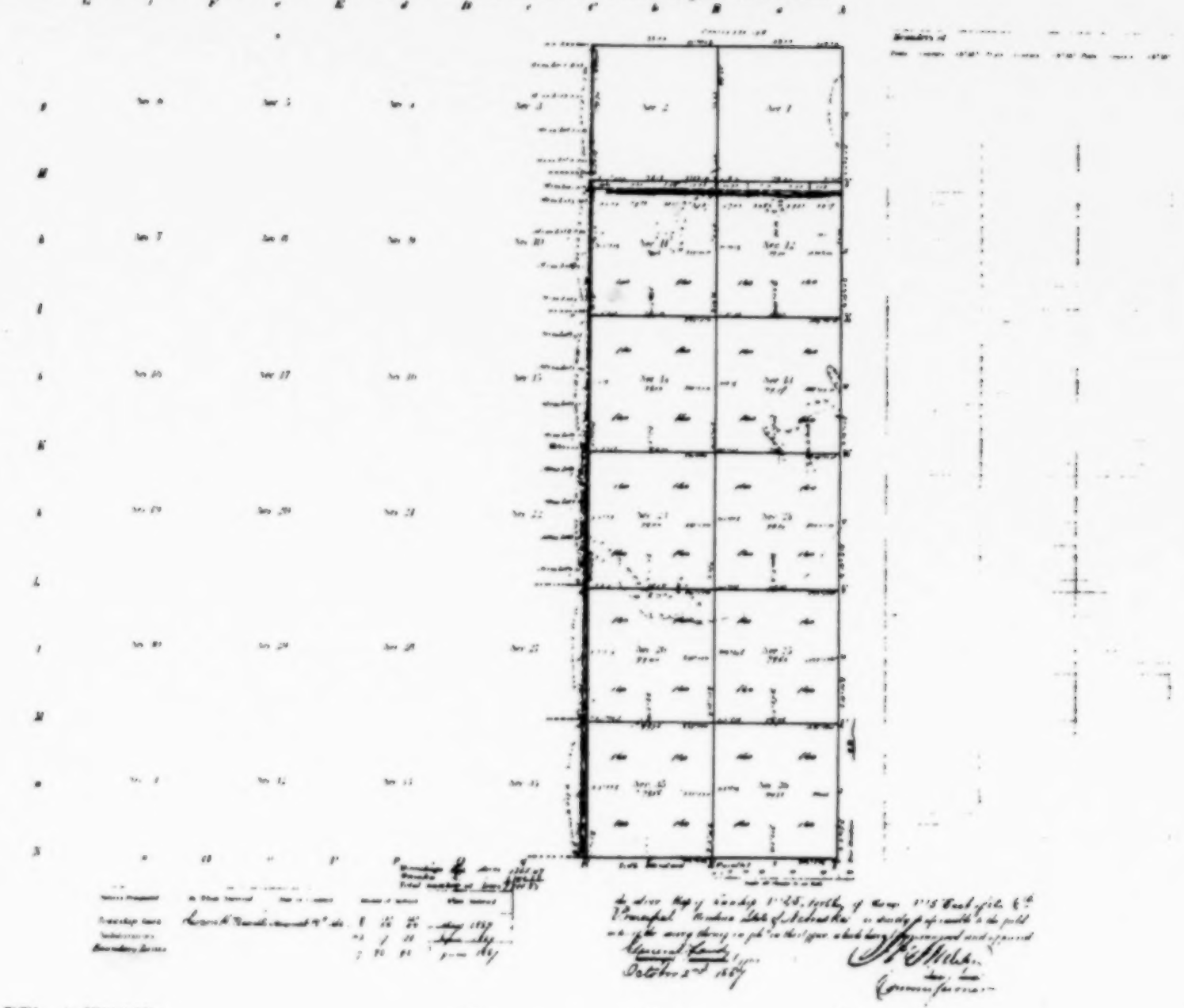
The self-reliance, industrious habits, and abundant resources of the Omahas, warrants the belief that at an early day they will voluntarily abandon the chase as a means of subsistence and be prepared to assume the duties of citizenship.

* * *

TOWNSHIP No. 24 North RANGE No. 5 East of the Sixth Principal MERIDIAN



TOWNSHIP No. 25 North RANGE No. 5 East of the Sixth Principal MERIDIAN



IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS,

MADE TO THE

SECRETARY OF THE INTERIOR,

FOR

THE YEAR 1869.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1870.

REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS.

[343] No. 99.

OMAHA INDIAN AGENCY, NEBRASKA,
Ninth month, 21*st*, 1869.

RESPECTED FRIEND: In submitting this, my first annual report of the condition of the affairs of the Omaha tribe of Indians, I have to express the satisfaction I have found in their orderly, peaceable, and sober habits during my short stay among them. Their freedom from the use of intoxicating drinks is especially worthy of notice.

Most of the tribe are beginning to realize the necessity of turning their attention to the cultivation

of the soil as their only means of future subsistence, and their great reluctance to abandon the chase is now yielding to the force of necessity. The prompt action of an effective police force of Indians, numbering over twenty, renders efficient aid in redressing the few wrongs that are committed. The population of the tribe appears to be slightly on the increase, as indicated by the pay-roll, which numbers fifteen more than last year. I regret that the limited opportunity of conversing with my predecessor prior to his leaving the agency has prevented me from giving a more full account of the affairs of the tribe before my arrival here.

AGRICULTURE AND SUBSISTENCE.

The principal resource of the tribe since my sojourn among them, as a means of subsistence, has been their remaining supply of corn. This [344] was nearly exhausted before the crop of the present season was fit for use. Their usual supply of animal food for the summer, obtained by means of the chase, was principally cut off by instructions from General Augur that it would not be prudent to allow them to go out on their usual summer hunt. In lieu of this supply a very small proportion of the money appropriated for the purchase of beef cattle was expended for that purpose, the Indians, from motives of economy, appearing to prefer to get along without it.

They are making preparations at present, however, to start on the fall and winter hunt in a short time.

About the same breadth of land has been cultivated in corn as last year, the product of which was then estimated at 20,000 bushels; and the crop of this year is thought to be more productive. The amount of wheat raised on the reservation this year is estimated at about 200 to 250 bushels on about 10 acres, and is the property of an individual. A tract of about 106 acres of prairie land has been broken the last summer, to be sown with wheat next year for the benefit of the tribe. Many of the more thrifty Indians have a good supply of garden vegetables.

The wet weather has delayed the securing of a full supply of hay for the cattle, but the Indians manifest a strong interest to provide enough for the winter.

STOCK.

The stock of the Indians consists principally of about forty pairs of oxen, thirty cows and calves, and a large number of ponies, estimated at about one thousand. Their stock generally is in very good condition at this time.

ALLOTMENT OF LANDS.

By the terms of the treaty of March 6, 1865, with the Omahas, it is provided that one hundred and sixty acres of their lands are to be assigned to each

head of a family, and forty acres to each unmarried man of eighteen years and upwards. Instructions from the Secretary of the Interior have extended the latter provision to females of the same age. Pursuant to instructions, arrangements were made soon after my arrival here to enter upon the allotment, which has progressed steadily and satisfactorily nearly to completion. A census of the tribe, taken with a view to the allotment, indicates that there are 278 families or heads of families, each of which is entitled to one hundred and sixty acres, and 46 males and 10 females unmarried of eighteen years and upwards, having a right to forty acres each. Before commencing with the allotment those entitled to receive land were requested to select their respective claims, and the apportionment has been made harmoniously, thus far, based upon the priority of these claims. About 209 farms of one hundred acres each and 46 of forty acres have been allotted up to this time, and stones marked have been planted at the corners of the subdivisions to define the boundaries.

The Indians manifest a great desire to have their houses built, and farms fenced, so as to be settled in their respective homes. With a view to accomplish this with as little expense and delay as possible, the steam-mill has been put in a tolerable state of repair, and additional teams provided for hauling raw timber to the mill to furnish lumber for building, in which labor, it is hoped, the Indians will render effective aid.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

REPORT

(Filed Jun. 24, 2013)

REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1871.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1872.

[435] REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS.

NEBRASKA SUPERINTENDENCY.

No. 50.

OFFICE OF SUPERINTENDENT OF INDIAN AFFAIRS,
Omaha, Nebraska, Ninth month 26, 1871.

RESPECTED FRIEND: In submitting this my third annual report, together with agents' reports for the northern superintendency, I have the satisfaction of being able to say, that the Indians under our care are advancing in civilization, and that five of the tribes have, during the year, increased in population.

THE SANTEE SIOUX.

By the accompanying report of Agent Asa M. Janney, who resigned his office the 21st of Seventhmonth last, it will be observed that the Santee Sioux have this year raised more grain and have a better prospect for garden vegetables than for several years past. The tract of land they inhabit, bordering on the river Missouri below the mouth of the Niobrara, is extremely rough and broken, much of it consisting of high bluffs and steep hills, unfit for tillage. The allotments of land in severalty assigned them are mostly on the river-bottom and in narrow valleys watered by small streams. On these allotments about eighty houses had been built when Agent Janney made his report. Most of these houses were built of logs, and constructed by the Indians themselves, with some assistance from the carpenter and his Indian apprentices. The doors and windows and boards for the floors were furnished by the agent. Cooking-stoves have also been supplied to all the Santees who have built on their allotments, and, for many of them, a few acres of ground have been broken, in order that next year they may cultivate their own fields.

It has been the policy of the agent to encourage the Indians to help themselves as far as practicable, believing that a comfortable cabin of their own building would tend more to render them independent and self-sustaining than a more showy and commodious dwelling built for them without an effort of their own. They have, during the last two years,

manifested an increasing disposition to promote their home comforts by the use of bedsteads, cupboards, chairs, and other household furniture. The women have made a large number of bed-quilts, that do credit to their skill and industry.

I refer to Agent Janney's report for other interesting particulars showing the progress of this tribe in civilization, and I concur with him in thinking that an industrial boarding-school would greatly benefit the tribe by encouraging among them the use of the English language, and instructing both sexes in the arts that minister to the subsistence and comfort of civilized communities.

Since the retirement of Agent A. M. Janney, Joseph Webster has occupied the post of agent for the Santee Sioux, and his report, herewith submitted, shows that the Indians are still industriously engaged in settling on their allotments, ten houses having been built during the last month. He reports that the mission schools are in a prosperous condition. A small school for instructing the Indian women and girls in industrial pursuits has been opened by a Friend with encouraging results.

The report of A. L. Riggs, missionary of the American Board and [436] superintendent of the Santee Normal Training-School, contains some suggestions worthy of attention.

No report has been received from the Episcopal mission.

THE WINNEBAGOES.

The accompanying report of Agent Howard White gives a very encouraging account of the Winnebago tribe of Indians, showing a manifest advance in civilization and an increase of population, which attest an improvement in their moral and sanitary condition.

Among the material improvements made during the year are the following, viz: The erection, by Indian labor, of seven frame and five log houses; thoroughly repairing three school-houses, and furnishing them with new desks; constructing eight miles of wire-fence, principally around lots cultivated by Indians; breaking four acres of prairie on each of eighty allotments; making over 100 Indian farms on which some breaking has been done. There have been purchased and distributed to the Indians about 45 cooking-stoves, 25 wagons and sets of harness, and 50 plows. Owing to extreme drought in the early spring the wheat-crop was injured, but the oats, corn, and potatoes have yielded well.

In my last annual report I stated the reasons which had induced the agent, with my approbation, to displace all the old chiefs and to appoint others who were working-men and advocates of civilization. The measure was sanctioned by a vote of the tribe, and at the end of a year a popular election was held for chiefs, twelve in number, who each receive a small salary. The election was conducted in an orderly manner, and resulted in the selection of men who

were mostly suitable for the position. I consider this a salutary and important measure. It has a tendency to weaken the old tribal relation, with all its superstitious ideas and customs, and to prepare the people for self-government. It will pave the way for the Indians to become citizens. Some of the tribe are looking forward to this result, but the large majority are fully conscious that they are not yet prepared for citizenship, and they prefer to remain as wards of the Government until further advanced in civilization. The remarks of Agent White on this subject are worthy of attention.

I also concur with him most heartily in his views relating to an industrial school for this tribe. They have ample means for its erection and support; they are desirous for its establishment, and they ask that a portion of their funds, invested in Government securities, may, by act of Congress, be appropriated to this purpose and to other beneficial objects.

The day-schools have been supported and well attended, as appears by a teacher's report, herewith submitted. Sabbath-schools have also been kept, and meetings for divine worship occasionally held; all Christian denominations being at liberty to hold religious meetings with the Indians.

THE OMAHAS.

The certificates sent to the Omahas in the Thirdmonth last, securing to them and their heirs their allotments of land, were received with general

satisfaction, and have proved to be an incentive to increased industry in the improvement of their farms. With the aid of the carpenter and his Indian apprentices, a number of comfortable cottages have been built for the Indians; a large amount of lumber has been sawed and much of it hauled by them to their allotments. The agent is desirous to push forward the building of houses and fencing of lots, but a deficiency of funds has cramped his endeavors. An excellent school-house has [437] been built, chiefly by Indian labor, and a block-house, formerly used for a fort, has been converted into a school-house. There are now three schools in operation on the reservation, with the most satisfactory results. I refer to the accompanying report of the agent, Dr. E. Painter, for interesting details of the condition and progress of the Omahas, showing that they are improving in their moral and social condition, that they fully appreciate the importance of education for their children, and that by a system of uniform kindness and justice, coupled with firmness, they are easily governed.

* * *

[439] WAYS AND MEANS.

In order to settle the Indians on their allotments of land, to break the prairie-sod, to fence their fields, to assist them in building comfortable cabins or cottages, to provide them with implements, live-stock, and seeds, and to establish day-schools and an industrial school on each reservation, will require a large amount of funds. In my two previous reports I have recommended that some portions of certain

reservations, which contain more land than the Indians need, should, with their consent, be sold at their fair market value, and the proceeds applied to the proposed improvements. With this view the Omahas, whose reservation contains 205,000 acres, have, by petition, expressed a wish to sell from the most western portion of their reservation 50,000 acres, as near as can be separated from the remaining portion of their lands by a line running along the section-lines from north to south.

The Otoes and Missourias, whose reservation contains 160,000 acres, have expressed a desire to sell about 80,000 acres, being the western half of their reservation, and lying wholly west of the Big Blue River, part in Nebraska and part in Kansas.

The Pawnees, whose reservation contains 288,000 acres, would sell about 50,000 acres, but the location of the part to be disposed of has not yet been determined.

During the last session of Congress, the President of the United States, at the request of a committee of Friends, sent a message to the Senate and House of Representatives submitting the draught of a bill intended to effect the object desired. It did not pass, owing, as was believed, to its being of too wide a scope, and applicable to Indian lands in general. I respectfully recommend that a special act, describing the lands proposed to be offered for sale in this superintendency, be submitted to Congress at its next session, authorizing the President to appoint commissioners to effect the sales.

CLOTHING AND SANITARY SUPPLIES.

It will be observed, on reference to the agents' reports, that very liberal contributions have been sent to all the agencies by the Friends connected with the yearly meetings of New York, Philadelphia, Baltimore, Ohio, Indiana, and Genesee. Nearly all the school-children except [440] those at the Santee agency, have been clothed in this way, many garments for the aged and infirm have been furnished, and suitable food for the sick has been supplied.

The pupils of the mission schools at the Santee agency have been provided for by contributions from their respective churches. Much good has resulted from these donations.

POPULATION.

It is a very encouraging feature in the reports from the several agencies this year that five of the tribes have increased in population, namely, the Santees, the Winnebagoes, the Pawnees, the Otoes, and the Iowas, making an aggregate gain of 143. Of this number, about 30 have been adopted into one of the tribes, and the remainder is the natural increase. The Omahas and the Sacs and Foxes number the same as last year.

The several tribes are reported as follows, viz:

	Males.	Females.	Total.
Santee Sioux	424	563	987
Winnebagoes	685	715	1,400
Omahas	479	505	984
Pawnees*	1,024	1,310	2,364
Otoes and Missourias	230	220	450
Iowas	109	106	215
Sacs and Foxes	42	38	80
Total	2,993	3,487	6,480

INDIAN CIVILIZATION.

Being about to retire from the position of superintendent of Indian affairs, I deem it not inappropriate to express the result of my observations and reflections on the subject of Indian civilization. It is well known that in nearly all cases of advancement from savage to civilized life the progress has been slow; that the transition has usually occupied several generations. It may, however, be accelerated by bringing the subjects to be acted upon into familiar intercourse with good and enlightened people, who, by a course of uniform justice and kindness, may gain their confidence, and, by examples of moral purity, inspire them with respect and love.

In the endeavors that have been made to civilize and christianize the Indians, too little attention has

* In the statistics printed with the Commissioner's Report for 1870, page 334, there is an error in the population of the Pawnees; it should be 2,325.

usually been given to the influence of woman and her peculiar adaptation to this work. In my judgment, the most efficient means we can use is to employ in the Indian service families composed of intelligent and virtuous men and women, accompanied by their children. Those should be selected who feel a real interest in the work, and who would engage in visiting the Indians in their dwellings, attending them in sickness, teaching their children, instructing the men in agricultural pursuits and the women in household duties, thus leading them, by example and precept, to appreciate the beauty and excellency of Christian principles. We have found by experience that very many of the Indian men may be induced, by liberal wages promptly paid, to perform the agricultural labors that were formerly imposed on their women, and that the Indian women very readily learn to attend to household duties; but our chief reliance is in the education of the young. [441] The children show an aptitude for learning and are very amiable, scarcely ever quarreling among themselves. There should be on every reservation a sufficient number of day-schools to accommodate all the children between the ages of six and twelve years. They should be carefully taught to speak, read, and write the English language, and should then be transferred to an industrial boarding-school, of which there should be one or more on each reservation. In these schools the boys should be taught farming, gardening, and the mechanic arts, and the girls instructed in housekeeping and sewing. By this means a tribe may be civilized and taught to speak the English language in a single

generation. While this system of education is going forward, allotments of land should be assigned to every family, implements of agriculture, seeds, and live-stock furnished them, and assistance given them in building cottages. Religious instruction should be given adapted to their condition, and the practical part of Christianity illustrated by example. By these means I believe the enlightened and humane policy of the President may be successfully established, and the aborigines of our country saved from extinction.

Very respectfully, thy friend,

SAM'L M. JANNEY,
Superintendent Indian Affairs.

Hon. H. R. CLUM,
Acting Commissioner Indian Affairs, Washington, D. C.

---

[445] No. 54.

OMAHA AGENCY, NEBRASKA,
Eighthmonth 21, 1871.

RESPECTED FRIEND: The following annual report of the affairs of this agency is herewith submitted:

During the past year the hopes heretofore cherished in relation to the capacity and inclination of these Indians to engage in agricultural pursuits, and to adopt the habits of civilized life, have been more than realized. A steady advance in the direction indicated has been observable throughout the year. Especially has the disposition to labor in the field been manifested in striking contrast with their

former slothfulness. This fact has been observed and commented upon by most of those who have visited the agency. Their tendency to nomadic habits seems to have been totally abandoned, and few of them are now inclined to leave their reservation, unless when called away by special business; in such cases they request a pass from their agent.

A lively interest is manifested among them upon the subject of education. Three schools, two of which have been established within the past year, have been well attended. These are all day-schools. The progress of the children in study has been highly encouraging and satisfactory. Through the liberality of Friends of Indiana yearly meeting, who exercise a special supervision over the affairs of this agency, nearly all the school-children, and many aged and infirm persons, have been comfortably clothed and furnished with other needed supplies. Reference is invited to the accompanying reports of the school-teachers upon this deeply interesting engagement, the successful prosecution of which is so essential to the future prosperity of these people.

The subject of finances seems to be the principal, if not the only, source of embarrassment or discouragement. The earnest appeal made to Congress at its recent session, by the chiefs on behalf of the tribe, [446] and unanimously sanctioned by the Indians, to provide for the enactment of a law authorizing the sale of 50,000 acres of the most western portion of their reservation for their benefit, was rejected, for the reason, it is alleged, that the bill submitted to

Congress embraced other subjects not sufficiently matured for its favorable action. The Indians are thus left almost wholly destitute of available resources for purposes of general improvement – such as building houses on the farms recently allotted to them in severalty, and providing teams, agricultural implements, seeds, &c., to enable them to engage in farming pursuits with profit and success. On this account the building of houses by the Indian carpenters, engaged in during the past year with so much interest and success, as well as many other improvements on the reservation, are now necessarily suspended for want of funds; and fears are entertained that the Indians may relapse into their former habits of indolence and improvidence, and thus become a burden to the Government and a discredit to the humane policy it has so wisely inaugurated. For this cause I most earnestly desire and request that Congress, at its approaching session, will, at an early day, favorably consider the reasonable and earnest prayer of these people to provide for the sale of so much of their surplus lands as will enable those placed in charge of them to proceed vigorously with the work of civilization and improvement so long urged upon them by the Government.

FARMING OPERATIONS.

The growing interest of the Indians in the products of the soil has been exemplified, during the present season, in the marked improvement in the cultivation of their crops compared with former years.

Notwithstanding a protracted drought throughout the summer, and still prevailing here, it is conceded that the crops this year are the best and most abundant ever raised upon this reservation. The Indians will have a large surplus of corn for sale, and wheat enough to supply their wants during a large proportion of the coming year; potatoes, beans, squashes, and other garden vegetables are also quite plentiful. Nearly all of the Indians have built substantial granaries for storing their corn, instead of burying it in the ground, as was their former custom, where a large proportion of it was generally damaged and unfit for use. Many of them have been engaged during the summer in plowing and opening farms on their individual allotments of land, and all seem anxious to be settled in their respective homes. Farm labor is now performed almost exclusively by Indian men, the females being thus relieved from the oppressive drudgery hitherto required of them.

BUILDINGS AND IMPROVEMENTS.

From five to ten Indian carpenters have been engaged since last report in building and various other improvements on the reservation, until these operations were necessarily suspended for want of funds. Six comfortable and substantial frame cottages for the Indians, each with five rooms and a neat piazza in front, have been built on their several allotments; also a large double house, with ten rooms, for the accommodation of teachers, and a commodious school-house, besides building several bridges, a large

ferry-boat, and more than twenty sleds for hauling logs, &c. These are among the results of the labor of these Indian apprentices. The rapid advances made by them in knowledge of the mechanic arts are very encouraging and gratifying.

[447] STOCK AND FARMING IMPLEMENTS.

There has been a considerable increase in the number of young cattle owned by the Indians since last report. They are ever on the alert for breaking a pair of young oxen whenever they arrive at a suitable age, and are becoming quite skillful in the management of their ox-teams. Occasionally they exchange their ponies for young cattle, which is a step in the right direction. One grain-reaper and one new mower have been added to the stock of farming implements since last year; but the want of a full supply of plows, wagons, harness, and other appliances for conducting farming operations successfully is still felt to be a source of discouragement.

EDUCATIONAL.

The efforts directed toward the improvement of the mental and moral condition of the Omaha Indian children during the past year have been crowned with eminent success. The desire for acquiring knowledge seems to be the most prominent inducement for the very regular attendance of the children, added to the encouragement they continually receive from their parents. As an evidence of the interest felt by the

Indians in the subject of the education of their children, I may notice the fact that many of the parents moved their tents to a position near the schoolhouses, so as to afford greater facilities for their regular attendance, a concession rarely to be met with among Indians. The institution of Firstday (or Sunday) schools has also been found quite beneficial; and recently sewing-schools for the instruction of girls, and arrangements for teaching Indian women to cut out and make up garments, have been added to their advantages. Still there is a great need felt for the establishment of an industrial school for the benefit of both sexes, though the want of funds is painfully felt to preclude all hope in this direction at present.

CONCLUDING REMARKS.

A residence of more than two years among these people, and my opportunities for free intercourse with Indians of various other tribes, fully confirm me in the belief that the Indians, as a class, are tractable, and easily governed by a system of uniform kindness and justice, coupled with resolute firmness in the right on the part of those appointed to manage their affairs. The reverse is certainly exceptional. When once the full confidence of an Indian is gained the victory is won.

The question as to the capacity of these people to become elevated to the plane of civilization and enlightemment, as well as self-supporting, at no distant day, and not only to receive intellectual culture with facility, but to become imbued with the

divine influences of Christianity, now remains no longer a problem. To promote these humane and charitable objects needs only the fostering hand of the Government, and the honest and earnest labors of those delegated to watch over their interests; and surely a people to whom this great and flourishing Republic is so largely indebted for the prosperity and happiness of its teeming millions can justly lay claim not only to the kindness and sympathy of the Government, but to the adoption of a liberal and extended policy on their behalf.

Very respectfully, thy friend,

E. PAINTER,
United States Indian Agent for the Omahas.

SAMUEL M. JANNEY,
Superintendent Indian Affairs, Omaha, Nebraska.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO

THE SECRETARY OF THE INTERIOR

FOR

THE YEAR 1872

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1872.

[212] NEBRASKA, KANSAS, AND THE INDIAN TERRITORY.

NORTHERN SUPERINTENDENCY.

No. 6. Barclay White, Omaha, Nebraska.
No. 7. Joseph Webster, Santee agency, Nebraska.
No. 8. Howard White, Winnebago agency, Nebraska.
No. 9. E. Painter, Omaha agency, Nebraska.
No. 10. Jacob M. Troth, Pawnee agency, Nebraska.
No. 11. T. Lightfoot, Great Nemaha agency, Nebraska.
No. 12. A. L. Green, Otoe agency, Nebraska.

CENTRAL SUPERINTENDENCY.

No. 13. Enoch Hoag, Lawrence, Kansas.

No. 14. B. W. Miles, Kickapoo agency, Kansas.

No. – . J. H. Morris, Pottawatomie agency,* Kansas.

No. 15. Mahlon Stubbs, Kansas or Kaw agency, Kansas.

No. 16. John B. Jones, Cherokee agency,† Indian Territory.

No. 17. T. D. Griffith, Choctaw and Chickasaw agency,† Indian Territory.

No. 18. F. S. Lyon, Creek agency,† Indian Territory.

No. 19. Henry Breiner, Seminole agency,† Indian Territory.

No. 20. Hiram W. Jones, Quapaw agency, Indian Territory.

No. 21. John Hadley, Sac and Fox agency, Indian Territory.

No. 22. J. T. Gibson, Osage agency, Indian Territory.

No. 23. Laurie Tatum, Kiowa agency, Indian Territory.

No. 24. John D. Miles, Upper Arkansas agency, Indian Territory.

No. 25. Jonathan Richards, Wichita agency, Indian Territory.

---

* No report received.

† Attached to the central superintendency for treaty purposes only.

No. 6.

OFFICE OF SUPERINTENDENT OF INDIAN AFFAIRS,
Omaha, Nebraska, 9thmonth 24, 1872.

RESPECTED FRIEND: In submitting this my first annual report of affairs of the northern superintendency, together with the agent's reports, it gives me pleasure to be able to state that, daring the past year, the conduct of the Indians under my care has been characterized by peace and good order. I consider it a fact worthy of notice that, during that period of time, no act of violence, not even an assault by an Indian upon a white person, has taken place in this superintendency, so far as has come to my knowledge, thus proving that the just and humane policy of the President of the United States has been eminently successful as applied to the Indians of the State of Nebraska.

* * *

WINNEBAGOES.

It is with no small degree of satisfaction that I am able to report the continued improvement of this tribe. All the men have adopted the dress of citizens, and, by reference to the interesting report of Caroline B. Thomas, teacher of a Winnebago school, we may conclude that, if the good influences which now surround the Winnebago children are continued for a few years longer, the women as well as the men will [213] eventually wear the costume of the whites. This will be a long step gained in the path that leads toward civilization. The annual election of the chiefs by the tribe is also an important step in the right

direction; thus fitting them for a higher plane of civilization. Their crops during the year have generally yielded abundantly, with the exception of the oat crop, which was nearly destroyed by hail. At the commencement of the wheat harvest, about two hundred of the men of the tribe requested passes from their agent to leave the reservation, and assist the neighboring farmers in gathering their wheat. One of the farmers afterward reported to the agent that these Indians worked equally as well as white laborers, and that without their assistance it would have been impossible to obtain sufficient labor to secure their crops.

The long delay in securing to the Winnebagoes their patents for their allotments of land has had a discouraging effect upon them, but, notwithstanding the fact that they have not yet received them, many of the Indians have commenced work on their respective allotments; and a contract has just been let for the construction of fifty dwelling-houses, to be built upon the allotments of those Indians who manifest an earnest desire to improve their land, and gather about their homes the comforts and conveniences of civilized life.

I wish to call special attention to that portion of Agent White's report wherein it is stated that the terms of the treaty of March 8, 1865, require that fourteen hundred acres of land should be broken for these Indians, whereas only six hundred have ever been broken for them upon the reservation. I cordially approve of the suggestion of Agent White, that an

appropriation be asked for at the next session of Congress, to enable the terms of the treaty to be complied with.

There has been a natural increase of twenty in this tribe during the last year, and twenty more by removal from Wisconsin, making a total increase of forty during the year. The tribe now numbers fourteen hundred and forty.

OMAHAS.

The Omahas having consented to the provisions of a recent act of Congress, providing for the sale of 50,000 acres of land from the western portion of their reservation, it is hoped that the proceeds arising therefrom will enable them to make such improvements on their allotments of land as they have been anxiously looking forward to, and, by the purchase of farm implements and stock, place them in an agricultural position that will enable them to dispense with the fruits of the chase, and turn their undivided attention to home industry. With this increased attention to agriculture the Omahas must soon look for a market for their surplus produce, as in their present condition no rations or supplies of food are dispensed to them. With the exception of their annuity in money, they now depend for subsistence entirely upon the fruits of their own industry. They are a peaceable people, and are on good terms of friendship with the white settlers around them, being temperate and honest in their character.

The Omahas have been much annoyed with losses of ponies by theft, mainly charged upon the Winnebagoes of Wisconsin. These Indians are in the practice of visiting their relations on the Winnebago reservation adjoining the Omahas, and, when returning, pass through the Omaha reserve, and, if the opportunity presents, appropriate ponies to their own use; then, crossing the Missouri River into Iowa, escape to their homes. There appears to be no existing law that will enable the Indian agents to arrest and punish these thieves after they have escaped into the neighboring State; and this state of affairs is producing ill-feeling between the tribes, as all such losses are charged by the Omahas upon the reservation Winnebagoes. The Winnebago agent is powerless to correct this evil. He cannot prevent the visits of said Indians, can form no opinion of the time of their departure, and, when arrest of offenders is made, is informed by State and national authorities that they have no jurisdiction in the case.

A recent council of arbitration has been held, composed of selected members of each tribe, their agents, and myself, to determine and adjust all matters of difficulty or claim between the tribes. The consequential damages arising from the above-mentioned acts have so far prevented a settlement, but the effort is not yet abandoned, and I am in hopes it will yet be accomplished to mutual satisfaction.

* * *

[215] INDIAN LABOR.

It is a fact, supported by the history of nations, that the intelligence and prosperity of a people increases in proportion as the women among them are respected and elevated.

One of the greatest obstacles in the way of Indian civilization has been the prevailing idea among all tribes that labor is derogatory to the character of a man, and that the burdens should be borne and the laborious duties performed exclusively by the women. I therefore consider it an encouraging feature of this work to be able to state that in this particular there has been a manifest improvement in several of the tribes of this superintendency. Many of the men have assisted in building their own houses, and have been quite successful in plowing their allotments, and in using mowing-machines and other implements in their mechanical and agricultural pursuits. In proportion as the men become more industrious, and provide comfortable houses for their families, the heavier burdens are lifted from the shoulders of the women, and they are gradually adopting the habits of civilized life. A great need among these people has been that of the presence of practical Christian women, to instruct Indian wives in the performance of their household duties, in the care of their children, and of the sick, and in the fitting and making of garments. To meet this want among the Santees, a young woman fitted for the position has just been sent out to them, under the auspices of the "Yearly meeting of Friends," of Ohio and Genesee, to devote

herself exclusively to the improvement and elevation of the Santee women.

In concluding these remarks upon Indian labor, permit me to say that, judging from my observations among the Indians of the Northern superintendency, I have every reason to believe that, if the present policy is continued, the day is not far distant when the increased industry manifested by many of them will result in the tribes becoming self-supporting from the labor of their own hands, independent of the yearly annuity which they now receive from former sales of land to the United States.

SCHOOLS.

Eleven day-schools and one industrial boarding-school are now in successful operation. In addition thereto, provision is made by the Congregational Church for the erection of an industrial boarding-school house for girls, at the Santee agency. The building of an industrial boarding-school house for the accommodation of eighty scholars and their teachers, at the Winnebago agency, is about being contracted for. Funds are now on hand for the erection of an additional building to the Pawnee manual-labor school house, which will increase its capacity from eighty to one hundred pupils. Two additional day-school houses will, as soon as possible, be constructed on the Pawnee reservation, and one day-school house on the Omaha reservation.

It is a satisfaction to state that, in all the schools in operation, the children are progressing well in their studies and that their parents are not only favorable to schools, but take a deep interest in the advancement of their children therein, frequently conducting them to school, and remaining to witness their exercises.

With the exception of the mission-schools on the Santee reservation, these schools are all taught in the English language, and although the teachers, in English experience a difficulty at first, on account of the natural shyness of the pupils, and their reluctance to speak a new language, even when partially acquainted with it, for fear of exciting ridicule and laughter, of which the Indian mind seems to be peculiarly sensitive, still, I consider it of vital importance for the future progress of the tribes that the English language shall be principally used in schools.

In all the schools it is a rule that the children shall be clean in person, and decently and comfortably clad, and when provision for clothing is not made from tribal funds, the society of Friends or churches, to which the missionaries belong, have furnished it.

The Pawnee and Otoe day-schools have heretofore been broken up during the winter buffalo-hunt, the children accompanying their parents, and returning, after the hunt, wild, untractable, and demoralized. Ascertaining that the parents were generally willing to leave their school-children at home, if they could be properly boarded and cared for, I applied to

the Commissioner of Indian Affairs for funds to pay the board of these children. They were promptly furnished me, cheap board was procured for the children, and the result was very satisfactory to all parties.

BUFFALO-HUNTING.

Three tribes still partially depend upon buffalo-hunting for subsistence. Upon each recurring hunt they find their pathway to the hunting-grounds more and more turned [216] aside by white settlements. The commanders of the military departments in which these trails lie have advised that two white men accompany each hunting-party to prevent collisions or depredations between Indians and whites, although it is found difficult to find suitable white men willing to take such charge. Still, as far as it has been tried, it has proved satisfactory, and I would recommend that funds be appropriated for the payment of such care-takers during the few years that these hunts are likely to continue.

SUPPLIES.

Under the present contract-system of procuring subsistence for the Indian tribes, supplies are brought from long distances and furnished with large profits to contractors, when in most instances in this superintendency, if the agents could under proper guards be permitted to purchase goods, as needed, in open market, they could procure the same supplies, of

better quality, at price, from small farmers near the reservations, or from Indians who have grown a surplus crop on their allotments of land. I desire to call especial attention to this subject. There has been a hostile feeling among the whites of this State against Indians remaining on reservations. This feeling, under the effect of the present policy, I am pleased to say, is gradually subsiding. If it is found by neighboring farmers that these agencies have become good cash markets for their surplus produce, instead of considering them encumbrances, they will deem it an advantage to be located near such a market. Again, if the industrious Indian can obtain at home a cash return for the surplus product of his labor, and keep within his tribe the large amount of cash capital now paid to the distant speculator, what an additional incentive it will be for him to continue his industry!

LAWS.

It is very important that a simple and efficient code of laws should be enacted for the suppression of crime and immorality upon Indian reservations, and proper places provided for the confinement and punishment of offenders against them.

Attention is called to the inefficiency of the national and State laws for the trial and punishment of whites and Indians for crimes committed upon Indians not citizens.

Instances have occurred during the year of parties convicted in an Indian council of horse-stealing, and arraigned before a United States commissioner, in order that they might receive greater punishment for the offense than the tribal laws would inflict, being discharged by said court for want of jurisdiction.

INDIAN APPRENTICES.

I feel that it is due to the Indians of the State of Nebraska to report the unlooked-for proficiency made by the young men of the respective tribes, who have been apprenticed to the various mechanical trades. They are rapidly learning to become carpenters, blacksmiths, tinsmiths, shoemakers, millers, and engineers, and as soon as they become competent will be placed at the head of their respective departments.

By reference to the reports of the agents of this superintendency, it will be seen that the Indian apprentices are equally as proficient as whites in acquiring a knowledge of the different trades to which they are apprenticed. This is an important fact, which should not be overlooked by those having them in charge, in their efforts to fit them for citizenship.

POPULATION:

Name of tribe.	Male.	Female.	Total.	Gain during year.	Loss during year.
Santee Sioux ...	424	541	965	.....	22
Winnebagoes ...	700	740	1,440	40	.....
Omahas	497	472	969	.....	15
Pawnees	909	1,538	2,447	83	.....
Otoes and Missourias.....	243	221	464	14	.....
Iowas	114	111	225	10	.....
Sacs and Foxes	43	45	88	8	.....
Total	2,930	3,668	6,598	155	37

In conclusion, allow me to remark that the progress of these Indian tribes toward civilization and citizenship, although necessarily gradual, is generally satisfactory.

The strong prejudice of the white settlers against this injured people, a prejudice founded upon tradition or general charges upon the race on account of individual acts, is slowly yielding before their good conduct and a better acquaintance with their true character.

[217] As these Indians improve in their habits of industry and make themselves useful and even necessary to the white settlers in assisting to cultivate the broad prairies yet unbroken, the efforts to drive them from the State without regard to justice or mercy will be less frequently agitated.

Judging from their recent advancement, I have every reason to believe that, with a continuance toward them of the present wise policy, and a better protection of their persons and property by the same laws that now protect citizens, the rising generation of the Indians of Nebraska will become useful citizens of the State.

Very respectfully, thy friend,

BARCLAY WHITE,
Superintendent Indian Affairs.

Hon. F. A. WALKER,
Commissioner Indian Affairs, Washington, D. C.

* * *

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO

THE SECRETARY OF THE INTERIOR

FOR

THE YEAR 1873

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1874.

ACTION IN REGARD TO INDIAN LANDS.

The Omaha, Pawnee, Ottoe and Missouria, and Sac and Fox of the Missouri tribes of Indians in Nebraska, having, through their respective chief and councils, expressed a desire to have portions of their reservation sold, it was recommended that Congress give the necessary authority for such action. This was done by act approved June 10, 1872, in which provision was made for the survey and sale of a portion of the following-named reserves, to the extent specified, viz: Omaha and Pawnee, not exceeding 50,000 acres each, and Ottoe and Missouria, not exceeding 80,000 acres, and the whole of the Sac and Fox of the Missouri reserve, amounting to about 16,000 acres. All of these tribes have assented to the provisions of this act, and the following exhibits a summary statement of the action had thereunder in the case of each of the reserves.

OMAHA.

The Department, in anticipation of the consent of the Indians to the provisions of the aforesaid act, under date of July 31, 1872, appointed commissioners of appraisal. The formal consent in writing of the Indians was not, however, filed in this office until the receipt of a letter from the Superintendent of Indian Affairs, bearing date September 26, 1872. Instructions for their guidance were prepared and forwarded as soon thereafter as practicable to the commissioners of

appraisal, who proceeded to perform their duties and submit their report, which received the approval of the Department January 10, 1873. Thereupon the lands were advertised for sale in tracts of not exceeding 160 acres each, on sealed bids, to the highest bidder for cash. The bids were duly opened, in compliance with the terms of the advertisement, and awards were made to the highest bidders of an aggregate quantity of 300.72 acres, for a sum total of $702.19½.

In view of the small number of bids received at this sale, it was deemed inexpedient to offer the lands again before next spring.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

NATIONAL ARCHIVES
MICROFILM PUBLICATIONS

Microfilm Publication M1011

SUPERINTENDENTS' ANNUAL NARRATIVE AND STATISTICAL REPORTS FROM FIELD JURISDICTIONS OF THE BUREAU OF INDIAN AFFAIRS, 1907-1938

Roll 170

Winnebago, 1920-35
Winslow Sanatorium, 1934, 1935
Wittenberg School, 1910-17

[SEAL]

THE NATIONAL ARCHIVES
NATIONAL ARCHIVES AND RECORDS SERVICE
GENERAL SERVICES ADMINISTRATION

WASHINGTON: 1975

92903

Office of Indian Affairs

1935 Annual Statistical Report

Section III. Land

State Nebraska Reservation Omaha

Agency or Jurisdiction Winnebago Agency.

PART 1. Reservation Additions and Subtractions

1. Area of original reservation, acres ..... 300,000.00 A.

2. Additions to reservation, 1/, acres 0

3. Reductions from reservation other than allotments, 1/, acres ..... 162,504.53 A.

1/ For all changes in area of reservation cite the Act or Acts of Congress, the Executive Order, etc. The number of acres for each change must be given below.

Additions	Date	Acres	Reductions	Date	Acres
			Sale to Winnebagoes	1865	100,000.00
			Sale to Winnebagoes-Act of 6/22/1874.		12,347.53 A.
			Sale – Land W.of RR.		50,157.00 A.

Compiled by _____ Verified by _____
Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

CONGRESSIONAL RECORD – SENATE.

DECEMBER 7,

* * *

[48] unjust discriminations by common carriers; which was referred to the Committee on Commerce.

Mr. MILLER, of California, presented the petition of Charles M. Blake, ex-post-chaplain in the Army of the United States, praying for restoration to the Army and for arrears of compensation; which was referred to the Committee on Military Affairs.

Mr. MITCHELL presented the petition of Cornelia A. Schultz, of Adams County, Pennsylvania, praying for the passage of an act granting her a pension and compensation for the losses she sustained at the battle of Gettysburgh, Pennsylvania; which was referred to the Committee on Pensions.

Mr. COCKRELL presented the petition of Joseph Hertford, praying compensation as clerk to the Indian office at the Sac and Fox agency, Indian Territory, in 1879; which was referred to the Committee on Claims.

Mr. CALL presented a memorial of citizens of the State of Florida, in favor of the appointment of Frank Jordan, of Jacksonville, in that State, to a lieutenancy in the Navy, and to his being placed upon the

retired list; which was referred to the Committee on Naval Affairs.

BILLS INTRODUCED.

Mr. JONES, of Florida, (by request,) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 189) for the relief of the heirs of General Count C. Pulaski; which was read twice by its title, and, with the accompanying paper, referred to the Committee on Revolutionary Claims.

Mr. DAWES asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 190) to authorize an appointment in the Army; which was read twice by its title, and referred to the Committee on Military Affairs.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 191) for the relief of Frances H. Plummer; which was read twice by its title, and, together with the papers on file in the case, referred to the Committee on Military Affairs.

Mr. FERRY asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 192) to quiet the title to certain lands in the Upper Peninsula of Michigan; which was read twice by its title, and referred to the Committee on Public Lands.

Mr. McDILL asked and, by unanimous consent obtained leave to introduce a bill (S. No. 193) for the relief of certain employés on the work for the

improvement of the Des Moines Rapids of the Mississippi River; which was read twice by its title, and referred to the Committee on Commerce.

Mr. PLATT asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 194) for the relief of Cyrus C. Clark, late additional paymaster in the Army; which was read twice by its title, and referred to the Committee on Military Affairs.

Mr. ROLLINS asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 195) for the relief of Henry P. Rolfe; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 196) to provide for the erection of a public building in the city of Concord, in the State of New Hampshire; which was read twice by its title, and referred to the Committee on Public Buildings and Grounds.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 197) for the relief of Greenleaf Cilley; which was read twice by its title, and referred to the Committee on Naval Affairs.

Mr. HILL, of Colorado, (by request,) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 198) for the relief of Frances Anna McNaughton; which was read twice by its title, and referred to the Committee on Military Affairs.

Mr. SAUNDERS asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 199)

to establish a branch mint of the United States at Omaha, in the State of Nebraska; which was read twice by its title, and referred to the Committee on Finance.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 200) to provide for the sale of a portion of the reservation of the Omaha tribe of Indians; which was read twice by its title, and referred to the Committee on Indian Affairs.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 201) for the relief of John S. Logan; which was read twice by its title, and, with the papers on file in the case, referred to the Committee on Claims.

Mr. MILLER, of New York, (by request,) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 202) for the relief of George Frick; which was read twice by its title, and, with the accompanying papers, referred to the Committee on Pensions.

He also (by request) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 203) for the relief of the widow and children of Smith E. G. Rawson; which was read twice by its title, and referred to the Committee on Patents.

He also (by request) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 204) for the relief of J. S. Underhill; which was read twice by its title, and referred to the Committee on Claims.

He also (by request) asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 205) for the relief of Sallie A. Spence; which was read twice by its title, and referred to the Committee on Claims.

Mr. WALKER asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 206) for the adjustment of the claim of the State of Arkansas against the United States; which was read twice by its title, and referred to the Committee on Public Lands.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 207) to extend the provisions of an act approved March 2, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands, and for other purposes;" which was read twice by its title, and referred to the Committee on Public Lands.

Mr. JONAS asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 208) for the relief of Robert H. Montgomery; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 209) to amend section 993 of the Revised Statutes of the United States for the District of Columbia; and an act entitled "An act to amend section 993 of the Revised Statutes of the United States for the District of Columbia," approved January 31, 1879; which was read twice by its title, and referred to the Committee on the District of Columbia.

Mr. JACKSON asked and, by unanimous consent obtained leave to introduce a bill (S. No. 210) for the relief of W. W. McDowell, administrator of the estate of Thomas Jones, deceased; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 211) for the relief of the Roman Catholic church of Saint Peter and Saint Paul, at Chattanooga, Tennessee; which was read twice by its title, and, with the papers on file in the case, referred to the Committee on Claims.

Mr. FARLEY asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 212) to amend sections 2582, 2583, 2607, and 2684 of the Revised Statutes of the United States, relating to the collection districts of California; which was read twice by its title, and referred to the Committee on Commerce.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 213) for the relief of Edward Byrne; which was read twice by its title, and referred to the Committee on Military Affairs.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 214) for the relief of John M. Dorsey and William F. Shepard; which was read twice by its title, and, with the papers on file in the case, referred to the Committee on Claims.

Mr. GARLAND asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 215) for the relief of the National Bank of Western Arkansas; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 216) for the relief of Jacob Adler, of Arkansas; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 217) for the relief of C. Frank; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 218) for the relief of J. R. Rutherford, of Arkansas; which was read twice by its title, and referred to the Committee on Claims.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 219) for the relief of Rebecca Wright, widow of James Wright, a soldier in the war of 1812; which was read twice by its title, and referred to the Committee on Pensions.

Mr. CALL asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 220) to authorize the Secretary of the Treasury to erect public buildings in the cities of Key West and Jacksonville, Florida; which was read twice by its title,

and referred to the Commitee on Public Buildings and Grounds.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 221) authorizing the President to appoint Frank Jordan upon the retired list of the Navy with the rank of lieutenant; which was read twice by its title, and referred to the Committee on Naval Affairs.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 222) to establish a branch of the United States land office at Freeport, in Walton County, Florida; which was read twice by its title, and referred to the Committee on Public Lands.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 223) providing for the erection of a light-house at Anclote Key, in Hernando County, Florida; which was read twice by its title, and referred to the Committee on Commerce.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 224) to amend section 2562 of the Revised Statutes of the United States, relating to the boundary lines of the collection district of Saint Mark's, in the State of Florida, and for other purposes; which was read twice by its title, and referred to the Committee on Commerce.

He also asked and, by unanimous consent, obtained leave to introduce a bill (S. No. 225) to establish a life-saving and life-boat service at or near Cape

San Blas, Calhoun County, Florida; which was read twice by its title, and referred to the Committee on Commerce.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

CONGRESSIONAL RECORD – SENATE.

* * *

[3077] OMAHA INDIAN RESERVATION.

The bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians, in the State of Nebraska, and for other purposes, was announced as the first in order upon the Calendar, and the Senate, as in Committee of the Whole, resumed its consideration.

Mr. SAUNDERS. On reflection I have come to the conclusion, so far as I am concerned, that it would be well to adopt the amendment offered by the Senator from Massachusetts, [Mr. DAWES.] That would secure to the Indians all the rights which they may have acquired on this land prior to the passage of the bill, if any. I consent to that in order, as much as anything else, to get rid of the question raised by the amendment of the Senator from Kansas, [Mr. INGALLS,] and dispose of the bill, because the question will evidently come up on the bill which is now before the Senate providing for distributing lands in severalty among the Indians of the several tribes throughout the whole country, both in the Territories and in the States. Inasmuch as the question will necessarily almost have to be discussed at that time, I think it would be well to let it go over until that bill comes up and to adopt now the amendment of the Senator from

Massachusetts, which will give all that will be required in this case. I do not wish to take up the time of the Senate. I merely rose to state that much as being my own views on the subject now.

Mr. INGALLS. Under parliamentary practice the motion of the Senator from Massachusetts is not strictly in order until my motion to amend has been first disposed of. But as I believe that the proposition of the Senator from Massachusetts will dispose of the point that I raised and reserve the general subject of exemption from taxation to be considered hereafter, with unanimous consent I will withdraw the amendment I offered in order that the amendment of the Senator from Massachusetts may be acted upon.

The PRESIDENT *pro tempore*. The Senator from Kansas withdraws his amendment.

Mr. DAWES. I now offer my amendment, and I should like to have it read again.

The PRESIDENT *pro tempore*. The Secretary will read the amendment of the Senator from Massachusetts.

The ACTING SECRETARY. In section 4, line 6, it is proposed to strike out all after the word "provided," as follows:

That patents issued to Indians shall expressly state that the lands conveyed shall, for the period of twenty-five years from the date thereof, be inalienable and exempt from incumbrance and taxation, and

that the title in its descent shall conform to the laws of the State of Nebraska.

And to insert in lieu thereof:

That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

Mr. BECK. The Senator from Massachusetts perhaps explained that amendment yesterday. There is no report accompanying the bill, and I happened to be in attendance on a session of a committee yesterday. I want to vote intelligently upon the amendment, and would be glad to hear what it means.

Mr. DAWES. The adoption of this amendment does not affect the merits of the whole bill. The whole bill rests upon a recommendation of the committee that it is proper to sell off from this reservation of about one hundred and fifty thousand acres 50,000 acres in a block on the western side of it. That is one question. But the Omaha Indians have the whole reservation and occupy it under an existing treaty in which it is stipulated that any Indian may go upon any part of the whole reservation and occupy one hundred and sixty acres for the head of a family, and eighty acres for a single individual, [3078] and shall be entitled under the treaty to an instrument in writing from the United States which is equivalent to a qualified patent. It is said by the Senator from Nebraska that no one of the Indians has so gone upon the 50,000 acres which it is proposed to sell. There are, however, quite a number of them who have gone

onto some part of the reservation and made such locations, and who are entitled under existing treaties to the qualified patent; they have come to Congress praying that Congress will give them the patent. To make it perfectly safe and preserve the rights of any Indian who may have located upon this land is the design of my amendment. I do not know that it will apply to any Indian, though I am not quite certain but what it will. Whether the bill with that amendment ought to pass is quite another question.

Mr. BECK. The only object I have, after hearing some of the discussion yesterday, but not much of it, is to so vote as to carry out the idea that, as the Indians have by treaty this reservation now, and the United States does not presume to tax it, and as they have a right to go upon any part of it and we have a right to locate them in severalty, we should assert the right to locate them in severalty. Mr. President, I cannot hear myself, and I do not propose to talk in the midst of so much confusion.

The PRESIDENT *pro tempore*. The Senate will please come to order. Gentlemen who are here by the courtesy of the Senate will take seats. Does the Senator from Kentucky consent to be interrupted. under the five-minute rule?

Mr. BECK. I do not desire to be interrupted by people talking all over the Senate.

The PRESIDENT *pro tempore*. Does the Senator desire to be interrupted by any Senator?

Mr. BECK. On any question he may desire.

The PRESIDENT *pro tempore*. Then it will be taken out of the Senator's time.

Mr. BECK. Certainly; I am seeking information now.

I desire that we shall have the right to locate in severalty these Indians upon their land and that we shall not tax them, and that when we do so locate them we shall put such a limitation as will enable them to hold the land for twenty or twenty-five years, so that no white man can swindle them out of their property. As we hold the whole reservation by treaty, on which we impose no taxes, I do not at all agree with the Senator from Kansas [Mr. INGALLS] that the State of Nebraska, or any other State, has the right of taxation. When we locate an Indian upon a portion of the territory in which he is now free from taxation, for the purpose of making the experiment of civilizing him by giving him a home of his own, we should protect him from taxation; we should protect him from being swindled; we should prevent white men from trading with him and taking that land away from him. We are about to enter upon the experiment of civilizing the Indians by giving them separate homesteads and by encouraging them in the arts of agriculture. If, when that is done, we are obliged, as seems to be intended, to submit them to State and other taxation, they will lose their land by taxation. If we allow white men to trade with them, they will get it away from them.

If we begin with the Omahas now and make their lands subject to taxation and give them the right to trade, and if the experiments we are now making are failures, then other Indians will not come under the terms we are now seeking to impose upon the Omahas unless they are protected – protected against themselves, protected against the right of white men to take their lands away from them. If this is an experiment made with uncommonly intelligent Indians, and if we can make it a success by giving them homes and protecting them from themselves, protecting their lands from sale, taxation, or anything else in the reservation that now belongs to them, then we are making a step in advance, and we can point the other Indians to it and show how the Omahas were protected by the Government in their efforts at civilization and in having homes of their own; whereas if the other rule prevails and we give it to them absolutely, and it can be taken away for taxes or by sales under judgments, every other Indian will point to the fact that the Omahas made the experiment and that it was a failure; and we may as well quit trying to give them homes.

Mr. JONES, of Florida. I appreciate very fully the importance of this question, but I do not think my friend from Kentucky [Mr. BECK] has stated it in all its length and breadth. If I understand the bill, it proposes to authorize the sale of an Indian reservation located in the body of a State. The Indians desire to sell the lands, and it is not denied that the lands may be purchased by white people as well as by

Indians; they are to be put up to the highest bidder and sold for the benefit of the tribe. It is understood that an Indian has the right of purchase the same as a white man with respect to the land.

I want to know if the Senator from Kentucky is prepared to advance the doctrine that when a white man or half a dozen white men purchase titles to land within this reservation and settle down with Indians on it, the one may be taxed by the State of Nebraska and the other not? Is that to be the rule?

Mr. BECK. I mean to say, if the Senator will allow me, that this reservation and all Indian reservations may be divided up into a hundred lesser reservations, and if there are forty-nine thousand acres of this fifty thousand acres sold to white men, and the remaining one thousand acres held by Indians and allotted to them in severalty, we have a right to regard that one thousand acres of the fifty thousand acres as still remaining a part of the Indian reservation, and we can protect them against taxation and against sales as we could if the original reservation had never been broken up, and it is only so far –

Mr. JONES, of Florida. I have but five minutes.

Mr. BECK. They are not taxed, they cannot be; and if they are our wards why may we not protect them?

Mr. JONES, of Florida. I do not deny the right of the Government to deal with the Indians in a tribal organization, but I cannot subscribe to the principle

put forth by the Senator from Kentucky in this case. I say we may divide up an Indian reservation into lots, and give each Indian his share, and keep from among them the white people; but if the General Government undertakes to mix up that Indian reservation with the territory of Kansas and authorizes the sale of their lands and the purchase of them by white men, and they are put side by side, you can never exempt the Indians from taxation in such a case as that without leading to great trouble and confusion.

What was the case of Georgia? The General Government recognized the right of the Cherokees to maintain their independent organization. The State of Georgia insisted upon her laws being extended over them. It created a controversy that almost drove the two peoples into bloodshed. The mandate of the Supreme Court was disregarded. The State of Georgia asserted her right over the Indians, and this Government denied it. We do not want any more troubles like that.

If you undertake to sell the Indian lands, and to permit the white people to buy them and settle side by side with the Indians, and thus consolidate and unite these two populations together, you cannot apply one rule to one and another to another. If you want to give Indians land in severalty, separate them from the white masses; recognize their independent organization, but do not undertake to mix them up side by side with the white people under such a system as this.

Mr. BUTLER. I wish to ask the Senator from Massachusetts a question. I understand from him that it is proposed to sell about fifty thousand acres of this reservation to anybody who chooses to purchase, Indian, white man, or anybody else. Do I understand that the Senator proposes to protect an Indian who purchases part of that 50,000 acres and takes it in severalty – does he propose to exempt that Indian from taxation?

Mr. DAWES. The Senator was not present, I presume, yesterday during the discussion, for such a case as this was expressly excepted. If my amendment is adopted the question now raised becomes an abstract question so far as this bill is concerned. It has no application to this bill. It is a very important question. I agree with the Senator from Kentucky that if we are under treaty stipulations with Indians whom we have put upon a reservation that we will guarantee them the land upon which there is a tribe whenever they choose to take it in severalty, *quoad hoc* each individual Indian occupies to that extent the reservation, with all the treaty stipulations around him to protect and guard him; but if an Indian buys like a white man any portion of this 50,000 acres, to come back to this bill, no one supposes that he ought to be upon any other ground than a white man who purchases a part of it.

But the reason for this discussion and the purpose of the original phraseology in the bill was to reach another class of Indians, a class of Indians who had gone under treaty stipulation in severalty upon

certain portions of the one hundred and fifty thousand acres, and claim under the treaty a right in severalty to that land under treaty stipulations which protect the whole tribe when they occupy it in common from taxation and from judgments; and it has always been supposed that we had authority under such circumstances to protect the Indian who took his title not by purchase as a white man does, but under treaty stipulation from taxation. But this amendment takes care of all those Indians without raising the question or passing upon the question suggested by the Senator from Kansas.

Mr. BUTLER. Why should not the principle apply just as well to the Indian who purchases outside of his reservation? The treaty stipulations apply, it seems to me, just as well if it is part of his land.

Mr. DAWES, The Indians as a tribe consent. This bill goes upon the theory that the Indians as a tribe consent to part with fifty thousand acres of their land, and to take in lieu thereof the proceeds of the sale. [The President *pro tempore* rapped with his gravel.] I hope the Senate will indulge me to answer the question. The bill provides for the mode of selling the land. If an Indian comes in as a purchaser, he comes in precisely as a white man. That is the answer.

Mr. ALLISON. Mr. President, the suggestion of the Senator from Kentucky [Mr. BECK] raises a new question about which I should like to have some information. This bill proposes to sell 50,000 acres of

the Omaha reservation. It seems to me before we agree to make this sale, or assent to it, we ought to know exactly how much land there is in the Omaha reservation, and whether it is a wise thing for us to part with this amount of their land on their account; and I should be glad to have somebody familiar with this bill inform us the extent of this reservation, the number of Indians upon it, and what [3079] there will be left for them in the way of agriculture when these 50,000 acres shall be sold, because if our general theory be true with reference to the Indian tribes that they ought to be made self-supporting and that they ought to take their lands in severalty at some time, we certainly ought not to part with the lands which they must in future occupy in that way. So I think somebody who has charge of this bill or who has particular knowledge of it ought to give us some information on these points.

Mr. SAUNDERS. I think I can answer to the satisfaction of the Senator from Iowa and others the question he has stated. The question was raised some time ago when this bill was before the Committee on Indian Affairs, and I took it upon myself to write to the Commissioner of Indian Affairs to ascertain whether I was correct or not as to the number of acres included in the reservation. I have this reply:

DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS,
Washington, December 15, 1881.

SIR: Replying to your note, received this morning, relative to the amount of land contained in the

Omaha reserve, I have to say that the reserve contained 143,225 acres. The Omahas number 1,121, which would give each member of the tribe about one hundred and twenty-eight acres.

Yours, respectfully,

H. PRICE, *Commissioner.*

Hon. A. SAUNDERS, *United States Senate.*

Deduct this from that, and it will leave 93,000 acres, or more than eighty acres to each individual member of the tribe, which is more than is required by any bill now before the Senate on the subject of dividing Indian lands in severalty. That letter is from the Commissioner of Indian Affairs himself, so it is evidently correct.

While I am on the floor I wish to state that I was probably misunderstood yesterday by some Senators who understood me to say that this land would be sold at $2.50 per acre. What I meant to say, and what I think I did say, was that none of it according to this bill would be sold for less than $2.50 per acre. It is to be appraised by three individuals, one to be selected by the Indians themselves, and two by the Secretary of the Interior, and the land is not to be sold for less than the Amount appraised by these individuals. I have gone further than any other bill that I know of in requiring the land to be put up to the highest bidder above that. No one can buy for less than the appraised value, but every one will have to give the highest price offered at the sale. I do not know of any bill that has made that provision except this one. I

thought it was proper to do so, lest it might be said hereafter that the land was thrown into the market at a low rate. As the Senator from Iowa [Mr. ALLISON] suggests, it is generally sold to the lowest bidder; but this bill requires it to go to the highest bidder, and then at not less than the appraised value, and none of it to be sold for less than $2.50 per acre. I know of nothing fairer that could be got up on this subject. The object of the Government is to sell this land and get it into cultivation, and the object of the Indians is to get the money and have it put in trust for them here in Washington where they can draw their interest.

There are eighteen miles of railroad running through this land that has not a house, or a tree, or a fence in it, or a fence-rail on it, nothing yielding anything in any shape or form. Every Senator here will see, when he knows that it is a first-class country, that the land will bring a good price, and that it ought to be sold and put into cultivation. The only thing was to see that the Indians themselves were ready for it. Twice they have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold. So there is nothing fairer than this bill as I have presented it now, and I am ready to answer any questions I can on the subject, if the Senate is not already fully satisfied.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Massachusetts, [Mr. DAWES.]

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

* * *

CONGRESSIONAL RECORD – HOUSE.

May 12,

[3880] MESSAGE FROM THE SENATE.

A message from the Senate, by Mr. SYMPSON, one of their clerks, informed the House that the Senate had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. No. 4185) making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1883, and for other purposes.

OMAHA INDIAN RESERVATION IN NEBRASKA.

Mr. VALENTINE. I ask unanimous consent to take from the Speaker's table and consider at this time Senate bill No. 1255, to provide for the sale of a

part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes. The Indians are anxious to dispose of this land in order that they may receive some interest on the money received for it, instead of holding the land without deriving any revenue from it.

Mr. HASKELL. I must object to that, unless it is first considered by the Committee on Indian Affairs of this House.

Mr. VALENTINE. Then I will ask that it be referred to the Committee on Indian Affairs.

There being no objection, the bill was taken from the Speaker's table, read a first and second time, and referred to the Committee on Indian Affairs.

* * *

CONGRESSIONAL RECORD – HOUSE.

August 3,

[6842] SALE OF OMAHA RESERVATION.

Mr. HASKELL. I submit a privileged report.

The Clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. No. 1255) providing for the sale of a part of [6843] the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes, having met, after full and free conference

have agreed to recommend, and do recommend, to their respective Houses as follows:

That the Senate recede from its disagreement to the House amendment; and the Senate agree to the same.

D. C. HASKELL,
J. K. JONES,
O. L. SPAULDING,
Managers on the part of the House.
H. L. DAWES,
GEORGE H. PENDLETON,
Managers on the part of the Senate.

Mr. SCALES. Does the bill come back with the amendment of the House?

Mr. HASKELL. The Senate withdrew their disagreement to the amendment of the House, and the conference report provides for the passing of the bill as it passed the House.

Mr. SCALES. After the action of the House any opposition might be considered factious.

The report was adopted.

Mr. HASKELL moved to reconsider the vote by which the conference report was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

* * *

[6998] PRESIDENTIAL APPROVALS.

A message from the President of the United States, by Mr. O. L. PRUDEN, one of his secretaries, announced that the President had on the 4th instant approved and signed the following bills:

An act (S. No. 346) to provide for the disposition of the Fort Larned military reservation; and

An act (S. No. 354) for the relief of Mrs. Caroline Mott, administratrix of the estate of Danford Mott.

The message also announced that the President had on the 5th instant approved and signed the following bills:

An act (S. No. 1120) for the relief of Eugene B. Allen;

An act (S. No. 50) authorizing the Secretary of the Interior to dispose of certain lands adjacent to the town of Pendleton, in the State of Oregon, belonging to the Umatilla Indian reservation, and for other purposes;

An act (S. No. 1959) granting the right of way to the Arizona Southern Railroad Company through the Papago Indian reservation in Arizona;

An act (S. No. 412) for the relief of Joab Spencer and James R. Mead;

An act (S. No. 547) granting a pension to E. G. Hoffman late a captain in the One hundred and sixty-fifth Regiment New York Volunteers;

An act (S. No. 1264) to increase the pension of Joseph N. Abbey;

An act (S. No. 340) granting a pension to Erastus Crippen;

An act (S. No. 703) granting a pension to Sarah Shea;

An act (S. No. 1170) granting a pension to Jane S. Taplin;

An act (S. No. 1437) granting a pension to Amos Chapman;

An act (S. No. 1680) granting a pension to Ann Leddy;

An act (S. No. 1925) granting a pension to Ann Elizabeth Rodgers;

An act (S. No. 2026) granting a pension to Mary E. Matthews;

An act (S. No. 2089) granting a pension to Caroline French;

An act (S. No. 70) granting a pension to Sarah Hayne;

An act (S. No. 1796) for the relief of Elizabeth A. Spotts;

An act (S. No. 101) for the relief of G. W. Thompson and others;

An act (S. No. 356) for the relief of the widow of George W. Flood;

An act (S. No. 138) for the relief of James Burke;

An act (S. No. 2171) to remove the political disabilities of Frank C. Armstrong, of Maryland; and

An act (S. No. 1440) relating to the registration of trade-marks.

The message further announced that the President had this day approved and signed the following bills:

An act (S. No. 790) for the relief of Joseph Hertford;

An act (S. No. 2151) to provide for the publication of the Tenth Census;

An act (S. No. 1472) for the relief of Julia A. Nutt, widow and executrix of Haller Nutt deceased;

An act (S. No. 96) for the relief of Joseph Conrad, of Missouri;

An act (S. No. 126) to reimburse the Creek orphan fund;

An act (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians, in the State of Nebraska, and for other purposes;

An act (S. No. 97) to authorize the settlement of the accounts of Acting Assistant Paymaster Edward K. Winship, United States Navy;

An act (S. No. 2099) for the relief of the executors of John W. Forney;

An act (S. No. 1612) to provide for the closing of an alley in square 751 in the city of Washington, District of Columbia, and for the relief of the Little Sisters of the Poor;

An act (S. No. 249) for the relief of Helen M. Scholefield;

An act (S. No. 2092) for the relief of Major W. R. King;

An act (S. No. 2172) to amend section 4702, title 57, Revised Statutes of the United States, and for other purposes; and

An act (S. No. 2002) to extend the fees of certain officers over the Territories of New Mexico and Arizona.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1882.

---

* * *

[LXVII] SALE OF A PART OF THE OMAHA RESERVATION.

In a special report to the department, dated September 18 (ultimo), the attention of the department was called to the recent act (approved August 7, 1882) providing for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska. It was stated that, in the absence of a specific appropriation to meet the expenses thereof, it was difficult to see how the survey (if a resurvey should be found necessary) and appraisement could be proceeded with; but it was suggested that steps might be taken to obtain the consent of the Indians, as required in sections 1 and 5 of said act, and that the allotments provided for in section 5 might be

selected and submitted for approval, so that no unnecessary delay might be experienced when the proper time should arrive for proceeding with the sale of the lands as authorized. By section 8 of the act the Indians are permitted, if they shall so elect, to select allotments within the tract designated to be sold, and while it is not thought that there are any who desire to make selections there, it might be well to ascertain their intentions in that respect, so that if there be any such they may make their selections and have them approved before the appraisement is begun.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1883.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1883.

* * *

[LXII] SALE OF OMAHA LANDS IN NEBRASKA, AND ALLOTMENT OF LANDS IN SEVERALTY TO OMAHA INDIANS.

Under authority of the act of Congress approved August 7, 1882 (22 Stat., 341), all that portion of the Omaha Indian reservation in the State of Nebraska lying west of the right of way of the Sioux City and Nebraska Railroad Company is to be appraised and sold for the benefit of the Indians of said reservation. A commission, composed of Messrs. J. B. Detwiler, Daniel Duggan, and Henry Fontenelle, of Nebraska, has been appointed to make the required appraisement, and these gentlemen are now engaged in that

duty. The quantity of land to be appraised and sold is estimated to be about 50,000 acres. It is said to be of most excellent quality, both for agriculture and stock purposes, and the indications are that it will command a good price. The funds arising from the sale, after paying the expenses incident thereto, are to be placed to the credit of the Indians, the income therefrom, at 5 per centum, to be expended for their benefit, under direction of the Secretary of the Interior.

Under the same act (section 5) the lands lying east of the railroad [LXIII] right of way are to be allotted in severalty to the Indians of said reservation, in quantity as therein provided, and in carrying out this wise purpose Miss Alice C. Fletcher, of New York (who has shown a deep interest in the welfare of the Omahas, and through whose instrumentality, very largely, the legislation authorizing the allotments with permanent titles thereto was secured), was designated by the Department to make the allotments, and appointed a special agent of this Bureau for that purpose. Miss Fletcher received her instructions under date of April 21 last, and already some 500 allotments have been made. The Indians are eager to secure their allotments, and the work is progressing satisfactorily.

By a proviso to the eighth section of the act, any Indian who elects to do so may take his allotment west of the railroad right of way. It has been ascertained, however, that there are but ten who desire to go west of the railroad. Of course their selections will be withheld from sale.

The residue of lands east of the railroad, after all allotments have been made, are to be patented to the tribe in common, provision being made for allotments to children that may be born within a period of twenty-five years thereafter.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR.

FOR

THE YEAR 1884.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1884.

* * *

[117] EDUCATION.

The facilities of educating this people are not equal to the demand, hundreds of dirty, ragged boys and girls running wild in camp, growing up in ignorance and vice, that ought to be in school, but there is no provision made for them. If they are wards of the Government the Government ought to provide for this great need. It is an injustice to the Indian child to permit it to grow up in ignorance. The Assinaboines at Wolf Point have long asked for a boarding school for their children. They have a mission day-school, taught by Rev. G. W. Wood, supported

by the Presbyterian Board of Foreign Missions, who has worked hard for the best interests of those people, and met with fair success. Rev. P. O. Mathews, an educated Indian, has charge of the Government day-school, and has more pupils than can be accommodated. In connection with the school Mr. Mathews has planted and cultivated 10 acres of ground, teaching the boys how to help themselves when out of school. At Poplar Creek there is a mission day-school, taught by Miss Dickson and Miss McCreight, under the supervision of Rev. M. E. Chapin, Presbyterian missionary. The school has been well attended, and many of the scholars show a proficiency in the Dakota, in which they are taught. The industrial boarding school, conducted by Rev. I. T. Miller, has been well attended, more than could be well cared for. A new corps of teachers throughout, some of them young and inexperienced, could not hope to be as successful as teachers of experience and adapted to the work.

At Deer Tail's, 7 miles from the agency, a mission day-school was conducted by Joseph Rogers, an Indian teacher, who made a success in his work. Also, at Lower Box Elder, a mission day-school was taught by Robert Hopkins, an Indian man of good standing among the Indians as well as the whites.

COURT OF INDIAN OFFENSES

has been of practical value to me. All minor offenses and difficulties that frequently arise that of necessity must be adjusted are turned over to the judges of the

court. The Indians are willing to abide by their decisions and submit to the penalty imposed. The decision and authority, coming as it does from their own people, has the moral tendency to educate them up to the idea of law. The punishment is usually in proportion to the offense or turpitude of the crime committed.

THE SUN DANCE

is a thing of the past. The Indians have lived as happy without one this year as in former years with it.

The outlook for this people is a very promising one. They have worked as never before, and will continue in this way since their subsistence depends upon their labor.

Very respectfully,

S. E. SNIDER,
Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

OMAHA AND WINNEBAGO AGENCY, NEBRASKA.,
September 6, 1884.

SIR: In compliance with instructions received from your office I have the honor to submit my third annual report of this agency for the fiscal year ending June 30, 1884.

LOCATION.

This reservation, occupied by two separate tribes, the Omahas and Winnebagoes, is located in the eastern part of the State of Nebraska, and is known on the maps of the State as "Blackbird" County. The Winnebagoes occupy the northern part of the reservation and the Omahas the southern part. The eastern part of the reservation, bordering on the Missouri River, is rough and broken by high bluffs and deep ravines. Back of this range of bluffs lie the valleys of the Omaha, Blackbird, and Logan Creeks. These valleys with the intervening table land form as fine farming land as there is in any country, adapted to all kinds or cereals, vegetables, and fruits for which Nebraska is fast becoming famous.

[118] OMAHAS.

The Omahas are a steady, sober, and industrious people, whose greatest desire is to secure permanent homes for themselves and their posterity. They are peculiarly attached to their homes. For two hundred years or more this has been their home, never leaving it except when driven away by other tribes or for the purpose of laying in their yearly supply of buffalo meat. On the summit of every bluff lie whitening in the sun the bones of their ancestors, and on these bluffs they, too, hope some day to lie with them.

The principal event of importance of the past year has been the completion of the work of allotting to the Indians their lands in severalty. In accordance

with the act of Congress approved August 7, 1882, 75,931 acres were allotted in 954 separate allotments to 1,194 persons. This number includes the wives, they receiving their lands with their respective husbands. About 55,450 acres remain to be patented to the tribe, according to the act, for the benefit of the children born during the period of the trust patents.

In the four townships nearest the railroad 326 allotments were taken, showing the practical appreciation by the people of a near market for their produce. In Township 24, Range 7 East, of the Sixth Principal Meridian, 105 allotments were made. The portion of this township lying west of the railroad and unallotted to Indians was opened last April to white settlement, and was immediately occupied. The unallotted portion of this township east of the railroad will next year be in the market, and the Indians located there will be surrounded by white neighbors, and thus be brought in close contact with civilized people. All the land lying near the white settlements which skirt the southern portion of the reservation is allotted, and the Indians, particularly those who are inclined to be progressive, are seeking rather than avoiding associations with the white people. This is a good indication. Progress cannot be made in isolation. The increasing crops of the Omahas to be marketed make them an important factor in the prosperity of the growing villages in their vicinity, and the tradesmen in the villages encourage their efforts. The people seem more and more in earnest to advance in

their farmers' mode of life. The security of their tenure of their land has had an excellent influence.

The very thorough manner in which the work of allotting those lands was done, and the practical instructions given them at the same time, has given those people an impetus which will never be lost. The thanks of every one of these people, and mine with them, are heartily given Miss A. C. Fletcher for her noble work. Henceforth the land follows descent according to the laws of the State, and the registry kept by Miss Fletcher will facilitate in securing the proper inheritance. This registry, giving as it does the exact status of the families as they will be recognized by the Government in the patents, will also render valuable assistance in maintaining the integrity of the family, a most important matter in the welfare of this people.

The increasing prosperity of the people and their contact with the white settlements makes the necessity of law as between Indians, and white men and Indians, of grave importance. The Indian court of offenses has proven efficient and effective in dealing with the class of disorders which came under its control. It is, however, daily more apparent that the three judges of this court should be compensated for their services, as they are frequently called upon to do unpopular things, and if true to the duties of their office often risk personal friendship and help. This is a just reason why they should be made independent and secure against loss. Another reason is found in the fact that the judges must be of necessity taken

from the more advanced and progressive people, and such have farms that cannot be left without loss while they are giving their time to trials. Each convening of the judges costs them a day's time, which cannot be given without loss. With proper compensation and under proper provisions the duties of the judges could be enlarged and the order and discipline of the people enhanced.

Another step taken by these people at this time, which indicates a determination to march on to independence, is the closing of their shops as tribal institutions. They believe they are ready for the discipline of paying for their own work. If they can succeed in this way it is undoubtedly educational in its tendency, as it necessitates forethought in providing and retaining the means necessary for paying the carpenter and blacksmith for their work; and if they succeed in this they will see the necessity for forethought and preparation in other matters, and that is the beginning of economy and thrift, which solves the whole problem for them of self-support. The Omahas are a determined and progressive people, and in a very hopeful condition.

WINNEBAGOES.

The Winnebagoes are in many respects as different from the Omahas as a Gypsy from a German. They seem to be by nature and practice a wandering and nomadic people. Some of them are continually on the move and embrace in their travels all the country

from Minnesota to Kansas. They are always active, energetic, and industrious, [119] quick-witted, full of expedients in case of emergency or accident, and sharp at a bargain. Many of them are good farmers and occupy their farms at all seasons. Others occupy their farms during crop season and then put their children in school and take the remainder of their family to the timber for the winter, where they engage in chopping and logging until seed time comes again. They fully understand the value of their labor and drive close bargains with their employers. They, as a tribe, prefer to be day laborers rather than farmers. Seed time and harvest are too far apart for them, and they prefer the quicker returns of the laborer, even at the expense of the greater profit.

They have never been the subject of persistent missionary labor, and as a consequence are disposed to gamble and take a drink when occasion offers, and have more faith in the teachings of their medicine men than in Gospel teachings. Most of them speak English, wear citizens' clothes, and when on the reservation live in houses and send their children to school.

The Winnebagoes were so unfortunate as to have money due them from land sold in Minnesota, and have, therefore, been the victims of political scheming and injudicious Congressional interference. The bill passed by Congress in 1881, dividing their money annuity between the Wisconsin and Nebraska Indians, in violation of the spirit of their treaties, was unfortunate for them, as it tends to keep them floating

between the payments in Wisconsin and on this reservation.

The act of Congress approved August 7, 1882, providing for the sale of the unoccupied portion of the Omaha Reservation, after allotting to each person a homestead, has created a desire among the Winnebagoes to do likewise. I think this a move in the right direction. Small reservations are decidedly the best for the Indians. It is only the isolated condition of large reservations that affords shelter and protection to those objectionable characters who demoralize Indians. These people cannot be brought too near to good settlers. The opinion prevails, in some places in the East that Western people are not proper associates for Indians. I wish to state that the settlers surrounding these reservations are sober, industrious, intelligent, and frugal farmers, and in all these respects will compare favorably with rural communities in any of the States. People are not all good about these reservations, but I hear that the same may be said even of Boston. The past fiscal year has been a year of progress with these Indians, and of a character that will result in great good in the future.

EDUCATIONAL.

The industrial boarding schools at both agencies are in a flourishing condition, and are doing good work. The attendance has been satisfactory throughout the year, that of the Winnebago school being larger than ever before.

The industrial part of the education consists of farm and garden work, care of stock, and the general chores about the house for the boys, while the girls are taught housekeeping, laundry work, cooking and baking, and sewing, both hand and machine. Some of the larger girls can cut and fit clothing for both sexes. All the girls' clothing and a greater part of the boys' is manufactured at the schools. We cannot at these schools teach the different trades as they are taught at Carlisle and Hampton; still something ought to be done in the way of teaching the use of carpenters' tools. A small work-shop should be fitted up, and there every boy should be taught the use of the saw, square, and plane. These boys should have a practical farmer's education.

The management of the schools is the same at both agencies. Two councilmen are appointed school inspectors for a term of one month. They visit the schools once each week, and by this means all the council have become interested in the schools and anxious to secure better attendance. To these men the parents state their grievances, real or imaginary, and they lay the matter before the superintendent and an explanation follows, and in nearly every case everything is adjustable harmoniously. Compulsory attendance has been practiced to a limited extent during the year, and I am satisfied that this is the only true way to educate the Indian. In this way every case may be reached. I have moved very cautiously in this matter, so as to create no violent

prejudices against it, but so far as we have gone in the matter it has met my fullest expectations.

Quite a number of the children are being educated at Carlisle, Hampton, and Houghton, Iowa. This is the true way to educate the Indian youth. I think those schools should supplement the work of the agency schools, and the children taken should be selected from the brightest and healthiest in attendance here.

The school in charge of the Board of Missions of the Presbyterian Church, known as "Omaha Mission," is doing a good work. The attendance during the past year has not been as large as it should be, owing to the fact that no boys were admitted. I think this a mistake. Provision should be made whereby they may take a limited number of boys under the age of ten years. This would increase the attendance and usefulness of the school and give better satisfaction to the Indians, especially to the church party, who regard this school as their own, and naturally wish that their boys should by educated in their church school.

[120] STATISTICAL.

The number of Winnebago Indians on this reservation is 1,205. Number of males above eighteen years of age, 351. Number of females above fourteen years of age, 422. Number of school children between the age of six and sixteen, 246. There is one school-house

at Winnebago Agency. The names of the school employés are as follows, viz:

Name.	Office.	Annual salary.
Charles H. Potter.....	Superintendent...	$700
Maria Potter.....	Matron	400
Josephine H. Babbitt	Teacher.....	500
Elizabeth Winkhaus	Assistant teacher...	400
Mary M. Myers.....	Seamstress.....	300
Rosabelle Richmond.....	Cook	300
Joana Christopherson.....	Laundress	300

The number of Omahas on this reservation is 1,167 Number of males over eighteen years of age, 279. Number of females above fourteen years of age, 337. Number of school children between the ages of six and sixteen, 303. There are two schoolhouses on the Omaha Reserve, one known as the Omaha industrial boarding-school and the other as the Omaha mission. The employés at the Omaha mission are as follows:

Name.	Office.	Annual salary.
Mrs. M. C. Wade.....	Superintendent...	$250
Marguerite La Flesche....	Teacher.....	200
Miss M. C. Fetter	Industrial teacher..	250
Miss M. L. Burns.....	Matron	250
Ella Blessing.....	Laundress	160
Elam Taylor.....	Cook	160

The employés at the Omaha industrial boarding school are as follows, viz:

Name.	Office.	Annual salary.
William C. McBeath.....	Superintendent...	$700
Mary McBeath	Matron	400
Clara Nicklin.....	Teacher.....	500
Victoria Hull.....	Assistant teacher...	320
Clementine Warner.....	Seamstress.....	300
Ella Dearing.....	Laundress	300
Jane Johnson	Cook	300

Very respectfully,

GEO. W. WILKINSON,
U. S. Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

---

* * *

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR.

FOR

THE YEAR 1885.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1885.

* * *

[135] OMAHA AND WINNEBAGO AGENCY, NEBRASKA,
September 18, 1885.

SIR: I have the honor to submit this, my fourth annual report.

This agency is situated in Nebraska, 25 miles south of Sioux City, Iowa. The reservation is 18 by 25 miles in extent, on the west bank of the Missouri River. This land was reserved by the Omahas when they ceded to the Government what is now the State of Nebraska, and was held by them alone until the Winnebagoes were removed from Minnesota to Crow Creek, Dakota Territory, and from there they drifted down to the Omahas.

The Government later purchased the north part of the Omaha Reservation for a home for the

Winnebagoes. This was not a judicious thing for the Omahas to do, as numerous differences have arisen between them because of the close proximity of the tribes, in most of which the more quiet Omahas were the victims. The most serious of these offenses was the stealing from the Omahas of near 200 ponies by the Winnebagoes. This matter has been investigated, and a bill was before Congress, recommended by the honorable Commissioner of Indian Affairs, to reimburse the Omahas from the Winnebago fund for this loss, but the bill was lost for want of time and has not been renewed. I earnestly recommend that something be done in this case.

The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder. The work of alloting them was so faithfully done by Miss A. C. Fletcher that the Indians have gone to work in earnest to make them homes on the land which they now believe to be theirs.

More than a year ago the Omahas felt themselves competent to do their own work and attend to their own affairs. At their request all their employés were discharged and they were left to themselves. The result, which then seemed doubtful, has shown the wisdom of their choice. They have attended to their own business and paid for their own work and are more independent and manly than before because of the consciousness that they are becoming men. They purchased eight reapers themselves and saved

their 2,000 acres of wheat, doing all the work and making their own plans themselves. They are justly proud of this is achievement. I earnestly hope that this spirit of independence will be fostered in them and they be permitted to attend to their own affairs with an occasional visit from the agent for the purpose of giving them advice and encouragement. They are manly men and are going in the right way.

The Omahas have a mission school for girls established many years ago by the Presbyterian Board of Foreign Missions. It is a very excellent school, and is doing a noble work. The ladies in charge are deserving of highest praise for their faithful labors.

There is also a Government school in successful operation at the agency, doing good work. The children are taught farm and house work at this school, and are making good progress. One thing is unpleasant about agency schools, and that is about twice a year the brightest and best of the scholars are called for and sent to Carlisle, Hampton, Houghton, Iowa, and Genoa, Nebr.

These Omahas are in a very prosperous and healthy condition, and if left to the kindly direction of my successor, Maj. C. H. Potter, they will soon become prosperous and profitable citizens and members of society.

The Winnebagoes are bright and lively people, capable of much good or great harm. Most of them have taken allotments of land on their reservation, and are living in houses and cultivating their farms. They took their lands fourteen years ago, and the frequent changes by death, migration, &c., make it necessary that their land should be reallotted and the surplus sold to actual settlers.

Small reservations are preferable in every way for the Indians. It tends to break up that demoralizing habit, roaming, and brings them in more direct contact with white people, which is of itself a civilizing influence. If every Indian family had a thrifty white family within half a mile of them the daily object-lessons would solve the Indian problem quicker than all the theoretic plans of all those philanthropists who worship the Indian at a distance.

[136] The Winnebagoes have a Government school in healthy condition and capable of doing great good. About fifty scholars attend, and they are as teachable and tractable as white children. The scholars cultivated 45 acres of corn and 10 acres of vegetables, and the work was done well. The most valuable part of the education of Indian children is not obtained from books. The Winnebagoes are in a hopeful condition, and if they would cease visiting and receiving visitors they would advance rapidly.

Very respectfully, your obedient servant,

GEO. W. WILKINSON,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

---

* * *

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR.

FOR

THE YEAR 1885.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1885.

* * *

[LXII] THE OMAHA RESERVATION IN NEBRASKA.

The act of March 3, 1885 (Stat. 23, 370), authorized the Secretary of the Interior, in his discretion, and with the consent of the Indians, to extend the time of payment as fixed by section 2 of the act of August 7, 1882 (Stat. 22, 341), for the Omaha

Reservation lands lying west of the Sioux City and Nebraska Railroad, recently sold under authority of said act, so that one-third of the purchase money should become due and payable in two years from the date when the land was thrown open to settlement, with one year's interest on the amount of the first installment; one-third in one year; and the remaining third in two years from date of first payment, with interest as provided in the act last above mentioned.

Owing to the stress of hard times, and the failure to get returns from their crops in time, it was found that many of the purchasers would be unable to make their first payments at the date fixed by law. It was not deemed advisable to go to the expense of reselling the lands, and in the light of past experience in similar cases it was believed that it would be more to the advantage of the Indians to extend the time of payment. The question having been submitted to the Indians as required, they readily gave their consent, and the extension was accordingly granted.

All the lands lying west of the railroad, not previously allotted to the Indians, have been sold.

By the same act (March 3, 1885) provision was made for the appraisement and sale of the unallotted lands in township 24, range 7 east. It was stipulated in the act of August 7, 1882, providing for the sale of the lands west of the railroad, &c., that all land in township 24, range 7 east, remaining unalloted on the 1st day of June, 1885, should be appraised and sold as other lands under the provisions of said act.

A commission, composed of Messrs. Henry E. Williamson, of Mississippi; Edward L. Thomas, of Georgia, and Henry Fontenelle, of Nebraska, was appointed, and sent out during the summer to make the required appraisement. They received their instructions from this office under date of July 3, 1885, and submitted their report and schedule of appraisement on the 30th of the same month. From their report it appears that the quantity of land appraised was 4,840.24 acres; the aggregate appraised value thereof $43,061.87, and the average value per here a fraction less than $9. The schedule of appraisement was approved [LXIII] by this office and submitted to the Department with letter of August 3 last, and having been approved by the Department, a duplicate copy thereof was transmitted to the General Land Office with Department letter of August 4, 1885, with directions for the disposal of the lands as provided in the act of August 7, 1882, aforesaid.

The act of March 3, 1885, also provided for the appraisement and sale of a tract of about 50 acres more or less in township 25 north, range 6 east, to be used as a mill-site. The consent of the Indians was made a prerequisite condition of the sale. Their consent having been obtained, Agent Wilkinson and Messrs. Baylis and Maryott, citizens of Nebraska, were, by authority of the Department, appointed to make the required appraisement. They submitted their report under date of June 12, 1885. The value placed upon the tract was $430.40½. By Department letter of June 22, 1885, the General Land Office was

directed to dispose of the land, through the proper local land office, for cash to the highest bidders, after due advertisement, the expenses of the sale to be paid by this office and the proceeds thereof to be deposited in the Treasury to the credit of the Omaha Indians, as proceeds of trust lands under the act of April 1, 1880. (Stat. 21, p. 70.)

It has been discovered that a small portion of the tract authorized to be sold, as above, is included in an Indian allotment, for which patent has issued. Consequently only so much of the tract as has not been thus disposed of can be sold under the present law.

Patents covering the allotments made by Special Agent Miss A. C. Fletcher, under the act of August 7, 1882, have been issued and will shortly be delivered to the Indians. The whole number of allotments made was 954.

THE WINNEBAGO RESERVATION IN NEBRASKA.

The Winnebago Reservation adjoins the Omaha Reservation on the north. It has an area of 170 square miles, or 108,924 acres. The Winnebagoes have frequently expressed a desire to sell a portion of their reservation, and seeing the good effect of the allotment system upon their neighbors, the Omahas, those who have not already taken allotments have been anxious to do so. The sale of a part of their reservation would, they believe, furnish them the means to procure farming implements and other

things necessary to a good start upon their individual allotments.

In my opinion legislation substantially like that recently had for the Omahas (act August 7, 1882) would prove of great benefit to the Winnebagoes. They would then have the benefit and be subject to the laws, both civil and criminal, of the State (Nebraska), and have individual title to their lands. As in the case of the Omahas, the unallotted lands remaining within the diminished reserve could be patented to the tribe in common.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1874.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1874.

* * *

[33] OMAHA AGENCY. – The *Omahas* are located on a reservation in the eastern part of Nebraska, on the Missouri River, containing 192,867 acres, all of which is valuable farming-land. By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale in trust for said Indians, leaving 143,225 acres as their diminished reserve. They number 951, are peaceable and well disposed, and are nearly self-sustaining, the only Government aid afforded them being $2 per capita annuity, and $10,000 per annum for schools and employés. In accordance with provisions of an act by the last Congress, they have sold 12,000 acres of woodland to the

Wisconsin Winnebagoes, for the sum of $30,000, which, at their request, will be largely expended in cattle and farming-implements, of which they stand in great need, and in securing increased educational facilities.

Three-fourths of their annuity of $20,000, which has heretofore been paid them in cash, per capita, is this year being used only in payment for labor, and in purchase of farming-implements. To this important change they have made little objection. They have cultivated during the year 1,000 acres of corn and 300 of wheat, which is double the amount cultivated last year, besides numerous small garden-patches, and have harvested over 3,000 bushels of wheat and nearly 35,000 bushels of corn, besides a large quantity of potatoes, beans, &c. The plowing of 1,100 [34] of these acres and the breaking of 200 was done by the Indians themselves, and without any compensation for their labor from the Government. They have also built 800 rods of fencing and cut 700 cords of wood. They own 700 horses, 175 head of cattle and 200 hogs. Two hundred thousand feet of lumber have been sawed during the year, and 7 frame and 8 log houses have been built.

The mortality among the children has been very great, owing to an epidemic of the measles, which nearly closed the schools during February and part of March. Notwithstanding this drawback, the three schools have been very prosperous, with an exceptionally regular attendance on the part of the pupils, showing the earnest desire of their parents, as well as

their own, for education. The whole number of pupils enrolled was 165, with an average daily attendance of 104. They have made good progress in acquiring English, and seem more willing to use it than are most of their race. One hundred and five Indians, mostly children, can read in English. Ten Indian apprentices have obtained a very good knowledge of the carpenter trade, and have built and finished several small houses without Government aid.

* * *

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1875.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1875.

* * *

OMAHA AGENCY, *Ninthmonth* 1, 1875.

RESPECTED FRIEND: I hereby submit my annual report of the condition of the Omaha Indians for the year ending the 31st ultimo:

Although there is much to dishearten all laboring with this class of persons – for progress is necessarily slow under the circumstances – yet I feel confident that I can report a decided improvement and advancement in the condition of the Omahas. They are each year becoming more nearly self-sustaining by means of agriculture, and labor now, instead of being considered degrading, is practiced by nearly every man in the tribe, and very many, indeed most, take pride in what they can accomplish. They manifest great desire, which I believe is genuine, to improve their condition, so far as they think they can do so. They often express hope for the future of their children, but frequently say that they (the older ones) cannot become white men; they generally speak in this way as an excuse for some custom or peculiarity that they do not feel ready yet to abandon. I have uniformly endeavored to treat them as men, in the true sense of the word; laboring to impress upon them the importance of self-reliance and self-support, and discouraging the spirit of beggary and dependence so common to Indians, and too much encouraged by many working with them.

The Omahas have cultivated this summer about 1,000 acres in corn, and nearly 500 acres in wheat, besides numerous patches of potatoes, beans, &c. They have sold of last year's crops 10,000 bushels of corn, several hundred bushels of wheat, besides potatoes and beans. They have broken of new prairie, ready for next season's cultivation, 681 acres, in lots of from 5 to 12 acres, all on individual allotments, and

without compensation. Considerable revenue is derived from tanning buffalo hides for white hunters and traders.

In the fore part of the season the crops on this reserve promised a bountiful harvest, but the great amount of wet weather has very materially lessened the prospect, and the numerous and heavy rains of late have badly damaged the wheat in stack. Thrashing is not yet done; it is estimated that the average yield will not exceed 7 or 8 bushels to the acre. Corn is very green and still growing; should it not be prematurely killed by frost, I estimate there will be an average yield per acre of 25 bushels. All the sweet or "squaw" corn will be dried while green, for food. As stated in my report last year, there has been no "agency or department farm," the Indians cultivating all for their own individual benefit, with no other remuneration than the prospective crop.

This reservation now comprises about 193,000 acres, including 50,000 acres offered for sale three years ago, but which failed to sell, and is now held in trust by the United States. I am decidedly of the opinion that much, if not most, of the opposition to the Indians felt among white settlers is in the fact that they hold large tracts of land lying idle and unproductive. I think it would be much better for all parties concerned if all this surplus land could be sold; and if the proceeds were not needed for the improvement of the tribe, let it be held as a trust-fund, drawing interest.

The Omahas are poorly supplied with stock; their horses are mostly Indian ponies, very inferior, and unfit for heavy work. Some of the more thrifty members of the tribe see the importance of disposing of these for fewer but better horses and cows. Of the oxen originally issued to the chiefs, but few remain, and they are old and of little value as work-cattle. Most of them will be butchered before winter. Several yoke of young oxen have been raised by members of the tribe. In addition to the above there are about 50 head of cows and young cattle, and 150 hogs.

The idea of fencing the crops has been abandoned as impracticable, on account of the expense and the scarcity of timber. Last spring I caused to be fenced about 320 acres, (on the agency tract,) to be used as a pasture for the horses when not at work; three or four

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR THE

YEAR 1876.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1876.

[240] ***Schedule showing the names of Indian reservations in the United States, agencies, tribes occupying the reservation, &c. – Continued.***

Name of reservation.	Agency.	Name of tribe occupying reservation.	Square miles.	Area in acres.	Date of treaty, law, or other authority establishing reserve.
MONTANA TERRITORY.					
Jocko	Flathead	Flathead, Pend d'Oreille, and Kootenay	2,240	1,433,600	Treaty of July 16, 1855, vol. 12, p. 975.
Blackfeet	Blackfeet	Blackfeet, Blood, and Plegan			Treaty of October 17, 1855, vol. II, p. 657; unratified treaties of July 18, 1866, and of July 13 and 15, and September 1, 1868; Executive orders, July 5, 1873, and August 19, 1874; act of Congress approved April 15, 1874, vol. 18, p. 28; and Executive order April 13, 1875.
Do	Fort Peck	Gros Ventre, River Crow, and Assinaboine, Teton, Santee, and Yanctonnai Sioux	41,330	26,451,200	
Crow	Crow	Mountain and River Crow	9,800	6,272,000	Treaty of May 7, 1868, vol. 15, p. 649.
Total			53,370	34,156,800	
NEBRASKA.					
Niobrara	Santee	Santee Sioux	180	*115,076	Act of Congress approved March 3, 1863, vol. 12, p. 819; Executive orders, February 27, 1866, July 20, 1866, November 16, 1867, August 31, 1869, and December 31, 1873.
Winnebago	Winnebago	Winnebago	171	*109,844	Treaty of March 8, 1865, vol. 14, p. 671; agreement of Omahas, July 31, 1874; act of Congress approved June 22, 1874, (Indian appropriation act,) vol. 18, p. 170; deed to Winnebago Indians, dated July 31, 1874.
Omaha	Omaha	Omaha	224	*143,225	Treaty of March 16, 1854, vol. 10, p. 1043; selections by Indians, with President's approval, May 11, 1855; treaty of March 6, 1865, vol. 14, p. 667; act of Congress, approved June 10, 1872, vol. 17, p. 391; act of Congress approved June 22, 1874, (Indian appropriations act,) vol. 18, p. 170; deed to Winnebago Indians, dated July 31, 1874.
Otoe	Otoe	Otoe and Missouria	134	:85,680	Treaty of December 9, 1854, vol. 11, p. 605; act of Congress, June 10, 1872, vol. 17, p. 391.
Iowa	Great Nemaha	Iowa	25	:16,000	Treaty of May 18, 1854, vol. 10, p. 1074; treaty of March 6, 1861, vol. 12, p. 1171.

Sac and Fox	do	Sac and Fox of the Missouri	8	*:4,863	Treaty of May 18, 1854, vol. 10, p. 1074; treaty of March 6, 1861, vol. 12, p. 1171; act of Congress approved June 10, 1872, vol. 17, p. 391.
Total			742	474,688	
NEVADA.					
Pyramid Lake	Nevada	Pah-Ute	503	:322,000	Executive order, March 23, 1874.
Walker River	do	do	498	:318,815	Executive order, March 19, 1874.
Moapa River	do	Sheav-wit, Pa-wea-pit, Ta-nout, Chen-ve-wava, and Kai-ba-bit Pi-Ute.	2	:1,000	Executive orders, March 12, 1873, and February 12, 1874, and act of Congress approved March 3, 1875, vol. 18, p. 445. Selection approved by Secretary of Interior, July 3, 1875.
Total			1,003	641,815	

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

FIFTY-SEVENTH ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS.

TO THE SECRETARY OF THE INTERIOR.

1888.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1888.

'istics relating to area, cultivation, and allotment of Indian lands, crops raised and stock owned by Indians, and miscellaneous products of Indian labor – Continued.

Lands.								Allotments.				Crops raised during the year by Indians.					Miscellaneous products of Indian labor.					Stock owned by Indians.				
Number of acres in reserve.	Number of acres tillable.	Acres cultivated during the year.		Acres broken during the year.		Fence.		Number of allotments made during the year.	Total number of allotments made to date.	Number of families cultivating lands allotted.	Number of other families engaged in farming or other civilized pursuits.	Bushels of wheat.	Bushels of oats and barley.	Bushels of corn.	Bushels of vegetables.	Tons of hay.	Pounds of butter made.	Thousand feet of lumber sawed.	Cords of wood cut.	Freight transported by Indians with their own teams.		Horses and mules.	Cattle.	Swine.	Sheep.	Domestic fowls.
		By Government.	By Indians.	By Government.	By Indians.	Number of acres under.	Rods of, made during the year.													Pounds.	Amount earned.					
1,776,000	400,000	....	425	25	....	2,000	3,200	....	....	....	197	....	....	3,000	8,750	400	300	40.5	700	a159,395	$898	555	761	8	305	1,000
371,200	14,000	....	146	....	37	863	100	....	....	....	170	....	....	2,160	565	237	....	....	40	167,434	1,266	935	....	....	....	114
b65,191	100,000	....	4,000	....	500	30,180	4,000	....	954	300	....	3,000	1,500	100,000	3,750	1,500	500	....	900	....	....	556	400	400	....	4,000
108,924	100,000	....	3,150	....	500	12,000	11,760	457	c974	300	100	2,000	1,000	100,000	2,700	1,600	250	50.	2,000	118,610	351	454	175	350	....	4,000
d96,000	20,000	....	415	....	98	800	1,800	....	....	....	41	1,822	2,315	6,485	e812	772	900	....	766	....	....	137	266	78	....	1,299
(f)	2,500	....	640	....	40	600	6,700	....	(f)	44	....	5,600	4,300	540	1,100	700	100	....	100	....	....	115	59	40	12	400
g1,131	20,000	....	3,885	....	210	2,600	8,600	....	884	206	....	11,600	2,040	45,600	9,250	14,000	200	....	500	250,000	400	472	315	107	....	2,321

641,815	5,000	27	1,500	...	60	3,200	770	10	114	114	175	2,100	1,230	150	900	457	....	...	280	208,677	1,255	1,210	105	....	. ..	450
312,320	11,000	100	250	30	100	1,200	1,280	....	....	....	77	400	720	....	1,625	290	....	. ..	75	1,500	30	551	450	100	....	75
474,240	800	42	315	2	47	1,250	700	...	...	....	70	50	2,500	3,500	500	40	....	....	78	91,453	720	600	250	....	60	....
8,205,440	15,000	50	10,000	...	10	300	....	. ..	..	..		8,000	....	65,000		..	....	....	....	8,000	40	245,300	3,500	..	800,000	....
2,508,800	6,000	...	1,200	...	.. .	....	175	....	.. .	..	} h3,051	75	....	40,000	} h4,653	....	....	....	....	12,000	120	900	300	....	16,500	....
906,845	h100,000	....	4,000	...	200	....	....	....	....	....	(j)	15,000	....	35,000	850	....	....	....	...	....	....	3,250	3,500	250	25,000	600
30,469	6,500	...	3,500	...	500	8,000	600	....	....	.. .	220	500	6,000	5,000	7,200	800	2,000	....	2,000	....	....	200	400	350	....	2,000

a Also 125 tons of hay. *b* The residue (77,154) allotted.
les old allotments of 1871-'72. *d* In Dakota. *e* Also, 1,600 cabbages.
f All homesteads. *g* The residue allotted. *h* Taken from last year.
i In Arizona. *j* Nearly all farming.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1898.

INDIAN AFFAIRS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1898.

[572] *Schedule showing the names of Indian reservations in the United States, agencies, etc.* – Continued. [573]

Name of reservation.	Agency.	Name of the tribe occupying reservation.	Area in acres.	Square miles.a	Date of treaty, law, or other authority establishing reserve.
MONTANA – cont'd.					
Jacko	Flathead	Bitter Root, Carlos band, Flathead, Kootenay, Lower Kalispel, and Pend d'Oreille,	b1,433,600	2,240	Treaty of July 16, 1855, vol. 12, p. 975.
Northern Cheyenne	Tongue River	Northern Cheyenne	c371,200	580	Executive order, Nov. 26, 1884.
Total			9,382,400	14,660	
NEBRASKA.					
Niobrara	Santee	Santee Sioux			Act of Congress approved March 3, 1863, vol. 12, p. 819; 4th paragraph, art, 6, treaty of Apr. 29, 1868, vol. 15, p. 637; Executive orders, February 27, July 20, 1866, Nov. 16, 1867, August 31, 1869, and December 31, 1873, and Feb. 9, 1885, 32,875.75 acres selected as homesteads, 88,908.01 acres selected as allotments, and 1,130.70 acres selected for agency, school, and mission purposes.
Omaha	Omaha and Winnebago.	Omaha	d64,558	101	Treaty of Mar. 16, 1854, vol. 10, p. 1043; selection by Indians with President's approval, May 11, 1855; treaty of Mar. 6, 1865, vol. 14, p. 667; acts of Congress approved June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18, p. 170; deed to Winnebago Indians, dated July 31, 1874; and act of Congress approved Aug. 7, 1882, vol. 22, p. 341. 77,786.63 acres allotted, the residue, 64,558 acres, unallotted.
Ponca	Santee	Ponka			Treaty of Mar. 12, 1858, vol. 12, p. 997, and supplemental treaty, Mar. 10, 1865, vol. 14, p. 675; act of Congress approved Mar. 2, 1889, sec. 13, vol. 25, p. 888. 27,202.08 acres allotted to 167 Indians, 160 acres reserved and occupied by agency and school buildings. (See letter book 205, p. 339, also President's proclamation, Oct. 23, 1890; vol. 26, p. 1559.)
Sioux (additional)	Pine Ridge	Oglala Sioux	32,000	50	Executive order, Jan. 24, 1882.

Winnebago	Omaha and Winnebago.	Winnebago	*d*27,495	43	Act of Congress approved Feb. 21, 1863, vol. 12, p. 658; treaty of Mar. 8, 1865, vol. 14, p. 671; act of Congress approved June 22, 1874, vol. 18, p. 170; deed from Omaha Indians, dated July 31, 1874. (See vol. 6, Indian deeds, p. 215.) 80,512.87 acres allotted to 1,014 Indians; the residue, 27,495 acres, unallotted.
Total			124,053	194	
NEVADA.					
Duck Valley *e*	Western Shoshone	Pai Ute and Western Shoshoni	*b*312,320	488	Executive orders, Apr. 16, 1877, and May 4, 1886.
Moapa River	Nevada	Chemehuvei (Tantawas), Kai-bab-bit, Pawipit, Paiute, and Shiwits.	*b*1,000	1½	Executive orders, Mar. 12, 1873, and Feb. 12, 1874; act of Congress approved Mar. 3, 1875, vol. 18, p. 445; selection approved by Secretary of Interior, July 3, 1875.
Pyramid Lake	do	Pai-Ute (Paviotso)	*d*322,000	503	Executive order, Mar. 23, 1874.
Walker River	do	do	*d*318,815	498	Executive order, Mar. 19, 1874.
Total			954,135	1,490½	
NEW MEXICO TERRITORY.					
Jicarilla Apache	Pueblo	Jicarilla Apache	*d*286,400	447½	Executive order, Feb. 11, 1887. 129,313.35 acres allotted to 845 Indians, and 280.44 acres reserved for mission, school, and agency purposes (L. B. 335, p. 323). The residue, 286,400 acres, unallotted.
Mescalero Apache	Mescalero	Mescalero and Mimbre Apache	*b*474,240		
Pueblo					
Jemez			*b*17,510	741	Executive orders, May 29, 1873, Feb. 2, 1874, Oct. 20 1875, May 19, 1882, and Mar. 24, 1888.
Acoma			*b*95,792		
San Juan			*b*17,545		
Picuris			*b*17,461		
San Felipe			*b*34,767		
Pecos			*b*18,763		
Cochiti			*b*24,256		
Santo Domingo			*b*74,743		
Taos	Pueblo	Pueblo	*b*17,361	1,081	Confirmed by United States patents in 1864, under old Spanish grants; acts of Congress approved Dec. 22, 1858, vol. 11, p. 374, and June 21, 1860, vol. 12, p. 71. (See General Land Office Report for 1876, p. 242, and for 1880, p. 658.)
Santa Clara			*b*17,369		
Tesuque			*b*17,471		
St. Ildefonso			*b*17,293		
Pojoaque			*b*13,520		

Pueblo					
Zia			b17,515		
Sandia			b24,187		
Isleta			b110,080		
Nambe			b13,586		
Laguna			b125,225		
Santa Ana			b17,361		
Zuñi	do	do	b215,040	336	Executive orders, Mar. 16, 1877, May 1, 1883, and Mar. 3, 1885. (Area of original Spanish grant, 17,581.25 acres.)
Total			1,667,485	2,605⅛	
NEW YORK.					
Allegany	New York	Onondaga and Seneca	b30,469		Treaties of Sept. 15, 1797, vol. 7, p. 601, and of May 20, 1842, vol. 7, p. 587.
Cattaraugus	do	Cayuga, Onondaga, and Seneca	b21,680		
				47⅛	Treaties of Sept. 15, 1797, vol. 7, p. 601, June 30, 1802, vol. 7, p. 70, and of May 20, 1842, vol. 7, p. 587. (See annual report, 1877, p. 164.)
				34	

a Approximate. *b* Outboundaries surveyed. *c* Partly surveyed. *d* Surveyed. *e* Partly in Idaho.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1900.

INDIAN AFFAIRS.

REPORT OF COMMISSIONER

AND

APPENDIXES

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1900.

[608] *Schedule showing the names of Indian reservations in the United States, agencies, etc.* – Continued. [609]

Name of reservation.	Agency.	Name of tribe occupying reservation.	Area in acres.	Square miles[1].	Date of treaty, law, or other authority establishing reserve.
MONTANA – continued.					
Fort Belknap	Fort Belknap	Grosventre and Assiniboin	537,600	840	Treaty of Oct. 17, 1855, vol. 11, p. 657; unratified treaties of July 18, 1866, and of July 13 and 15 and Sept. 1, 1868; Executive orders, July 5, 1873, and Aug. 19, 1874; act of Congress approved Apr. 15, 1874, vol. 18, p. 28; Executive orders, Apr. 13, 1875, and July 13, 1880, and agreement made Jan. 21, 1887, approved by Congress May 1, 1888, vol. 25, p. 124; agreement made Oct. 9, 1895, approved by act of Congress June 10, 1896, vol. 29, p. 350.
Fort Peck	Fort Peck	Assiniboin, Brulé, Santee, Teton, Hunkpapa, and Yanktonai Sioux.	1,776,000	2,775	Treaty of Oct. 17, 1855, vol. 11, p. 657; unratified treaties of July 18, 1866, and of July 13 and 15, and of Sept. 1, 1868; Executive orders, July 1, 1873, and Aug. 19, 1874; act of Congress approved Apr. 15, 1874, vol. 18, p. 28; Executive orders, Apr. 13, 1875, and July 13, 1880; and agreement made Dec. 28, 1886, approved by Congress May 1, 1888, vol. 25, p. 116.
Jocko	Flathead	Bitter Root, Carlos Band, Flathead, Kutenai, Lower Kalispel, and Pend d'Oreille.	[2]1,433,600	2, 240	Treaty of July 16, 1855, vol. 12, p. 975.
Northern Cheyenne	Tongue River	Northern Cheyenne	[3]489,500	765	Executive orders, Nov. 26, 1884, and Mar. 19, 1900.
Total			9,500,700	14,845	
NEBRASKA.					
Niobrara	Santee	Santee Sioux			Act of Congress approved Mar. 3, 1863, vol. 12, p. 819; 4th paragraph, art. 6, treaty of Apr. 29, 1868, vol. 15, p. 637; Executive orders, Feb. 27, July 20, 1866, Nov. 16, 1867, Aug. 31, 1869, Dec. 31, 1873, and Feb. 9, 1885, 32,875.75 acres selected as homesteads, 38,908.01 acres selected as allotments and 1,130.0 acres selected for agency, school, and mission purposes.

Omaha	Omaha and Winnebago	Omaha	[4]15,097	23$\frac{1}{7}$	Treaty of Mar. 16, 1854, vol. 10, p. 1043; selection by Indians with President's approval, May 11, 1855; treaty of Mar. 6, 1865, vol. 14, p. 667; acts of Congress approved June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18, p. 170; deed to Winnebago Indians, dated July 31, 1874; act of Congress approved Aug. 7, 1882, vol. 22, p. 341, and act of Mar. 3, 1893 (27 Stats., p. 612); 127,247.79 acres allotted; the residue, 15,097 acres, unallotted.
Ponca	Santee	Ponca			Treaty of Mar. 12, 1858, vol. 12, p. 997, and supplemental treaty, Mar. 10, 1865, vol. 14, p. 675; act of Congress approved Mar. 2, 1889, sec. 13, vol. 25, p. 888. 27,202.08 acres allotted to 167 Indians; 160 acres reserved and occupied by agency and school buildings. (See letter book 205, p. 339, also President's proclamation, Oct. 23, 1890; vol. 26, p. 1559.)
Sioux (additional)	Pine Ridge	Oglala Sioux	32,000	50	Executive order, Jan. 24, 1882.
Winnebago	Omaha and Winnebago	Winnebago	[4]27,495	43	Act of Congress approved Feb. 21, 1863, vol. 12, p. 658; treaty of Mar. 8, 1865, vol. 14, p. 671; act of Congress approved June 22, 1874, vol. 18, p. 170; deed from Omaha Indians, dated July 31, 1874. (See vol. 6, Indian deeds, p. 215.) 80,512.87 acres allotted to 1,014 Indians; the residue, 27,495 acres, unallotted.
Total			74,592	116$\frac{1}{7}$	
NEVADA.					
Duck Valley[5]	Western Shoshoni	Paiute and Western Shoshoni	[3]312,320	488	Executive orders, Apr. 16, 1877, and May 4, 1886.
Maopa River	Nevada	Chemehuevi, Kaibab, Pawipit, Paiute, and Shivwits.	[3]1,000	1$\frac{1}{5}$	Executive orders, Mar. 12, 1873, and Feb. 12, 1874; act of Congress approved Mar. 13, 1875, vol. 18, p. 445; selection approved by Secretary of Interior, July 3, 1875.
Pyramid Lake	do	Paiute	[3]322,000	503$\frac{1}{5}$	Executive order, Mar. 23, 1874.
Walker River	do	do	[3]318,815	498$\frac{1}{5}$	Executive order, Mar. 19, 1874.
Total			954,135	1,491	
NEW MEXICO TERRITORY.					
Jicarilla Apache	Pueblo	Jicarilla Apache	[4]285,400	447$\frac{1}{5}$	Executive order, Feb. 11, 1887. 129,313.35 acres allotted to 845 Indians, and 280.44 acres reserved for mission, school, and agency purposes (L. B. 335, p. 323). The residue, 286,400 acres, unallotted.

Mescalero Apache	Mescalero	Mescalero and Mimbreño Apache	[1]474,240	741	Executive orders, May 29, 1873, Feb. 2, 1874, Oct. 20 1875, May 19, 1882, and Mar. 24, 1883.
Pueblo					
Jemez			[1]17,510		
Acoma			[2]95,792		
San Juan			[2]17,545		
Picuris			[2]17,461		
San Felipe			[2]34,767		
Pecos			[2]18,763		
Cochiti			[2]24,256		
Santo Domingo			[2]74,743		
Taos			[2]17,361	1,081	Confirmed by United States patents in 1864, under old Spanish grants; acts of Congress approved Dec. 22, 1858, vol. 11, p. 374, and June 21, 1860, vol. 12, p. 71. (See General Land Office Report for 1876, p. 242, and for 1880, p. 658.)
Santa Clara	Pueblo	Pueblo	[2]17,369		
Tesuque			[2]17,471		
St. Ildefonso			[2]17,293		
Pojoaque			[2]13,520		
Sia			[2]17,515		
Sandia			[2]24,187		
Isleta			[2]110,080		
Nameb			[2]13,586		
Laguna			[2]125,225		
Santa Ana			[2]17,361		

[1] Approximate. [2] Outboundaries surveyed. [3] Partly surveyed. [4] Surveyed. [5] Partly in Idaho.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR.

1906.

INDIAN AFFAIRS.

REPORT OF COMMISSIONER AND APPENDIXES

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1906.

* * *

[460] *Schedule of the name of each Indian reservation, under what agency or school, tribes occupying or belonging to it, area unallotted, and authority for its establishment* – Continued.

Name of reservation and tribe.	Area.	Date of treaty, law, or other authority establishing reserve.
NEBRASKA.	*Acres.*	
Niobrara ..... (Under Santee School.) Tribe: Santee	.....	Act of Mar. 3, 1863, vol. 12, p. 819, 4th paragraph, art. 6. treaty of Apr. 29, 1868, vol. 15, p. 637;

Sioux.		Executive orders, Feb. 27, July 20, 1866, Nov. 16, 1867, Aug. 31, 1869, Dec. 31, 1873, and Feb. 9, 1885; 32,875.75 acres selected as homesteads, 38,908.01 acres selected as allotments, and 1,130.70 acres selected for agency, school, and mission purposes; unratified agreement of Oct. 17, 1882. (For modification see sundry civil appropriation act approved Mar. 3, 1883, vol. 22, p. 624. For text see misc. Indian doc., vol. 14, p. 305.) Act of Apr. 30, 1888, vol. 25, p. 94, not accepted.
Omaha..... (Under Omaha School.) Tribe: Omaha	°12,421	Treaty of Mar. 16, 1854, vol. 10, p. 1043; selection by Indians with President's approval, May 11, 1855; treaty of Mar. 6, 1865, vol. 14, p. 667; acts of June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18, p. 170, deed to Winnebago Indians dated July 31, 1874; act of Aug. 7, 1882, vol. 22, p. 341, act of Mar. 3, 1893 (27 Stats., p. 612); 129,470 acres allotted; the residue, 12,421 acres, unallotted.

Ponca..... (Under Santee School.) Tribe: Ponca.	.....	Treaty of Mar. 12, 1858, vol. 12, p. 997, and supplemental treaty, Mar. 10, 1865, vol. 14, p. 675; act of Mar. 2, 1889, sec. 13, vol. 25, p. 892. 27,202.08 acres allotted to 167 Indians; 160 acres reserved and occupied by agency and school buildings. (See letter book 205, p. 339, also President's proclamation, Oct. 23, 1890; vol. 26, p. 1559.)
Sioux (additional)..... (Under Pine Ridge Agency.) Tribe: Oglala Sioux.	640	Executive order, Jan. 24, 1882.
Winnebago ..... (Under Winnebago School.) Tribe: Winnebago.	°1,711	Act of Feb. 21, 1863, vol. 12, p. 658; treaty of Mar. 8, 1865, vol. 14, p. 671; act of June 22, 1874, vol. 18, p. 170; deed from Omaha Indians dated July 31, 1874. (See vol. 6, Indian deeds, p. 215.) 106,040.82 acres allotted; 480 acres reserved for agency, etc.; the residue, 1,710.80 acres, unallotted.
Total	14,872	

NEVADA.		
Duck Valley[b]..... (Under Western Shoshoni School.) Tribes: Paiute and Western Shoshoni.	[c]312,320	Executive orders, Apr. 16, 1877, and May 4, 1886.
Moapa River..... (Under Moapa farmer.) Tribes: Chemehuevi, Kaibab, Pawipit, Paiute, and Shivwits.	[c]1,000	Executive orders, Mar. 12, 1873, and Feb. 12, 1874; act of Mar. 13, 1875, vol. 18, p. 445, selection approved by Secretary of the Interior, July 3, 1875; Executive order of July 31, 1903.
Pyramid Lake .... (Under Nevada School.) Tribe: Paiute.	[d]322,000	Executive order, Mar. 23, 1874. (See sec. 26, Indian appropriation act, approved Apr. 20, 1904, vol. 33, p. 225.)
Walker River..... (Under Carson School.) Tribe: Paiute.	[c]50,809	Executive order, Mar. 19, 1874; joint resolution of June 19, 1902, vol. 32, p. 744; act of May 27, 1902 (32 Stat., pp. 245-260); act of Mar. 3, 1903, vol. 32, pp. 982-997; act of June 21, 1906, vol. 34, p. 325; proclamation of President, Sept. 26, 1906,

		opening ceded part to settlement. It contains 268,005.84 acres, leaving in diminished reserve 50,809.16 acres. Allotted to Indians, 9,783.25 acres; reserved for agency and school, 80 acres; reserved for cemetery, 40 acres; reserved for grazing, 37,390.29 acres; reserved for timber, 3,355.62 acres; reserved for church purposes, 160 acres. (L. B. 885, p. 187.) Subject to disposition under President's proclamation, 268,005.84 acres.
Total	686,129	
NEW MEXICO		
Jicarilla Apache ... (Under Jicarilla School.) Tribe: Jicarilla Apache.	[b]286,400	Executive orders Mar. 25, 1874, July 18, 1876, Sept. 21, 1880, May 15, 1884, and Feb. 11, 1887. 129,313.35 acres allotted to 845 Indians, and 280.44 acres reserved for mission, school, and agency purposes. (L. B. 335, p. 323.) The residue, 286,400 acres unallotted.

Mescalero Apache..... (Under Mescalero School.) Tribes: Mescalero and Mimbreño Apache.	[b]474,240	Executive orders, May 29, 1873, Feb. 2, 1874, Oct. 20, 1875, May 19, 1882, and Mar. 24, 1883.

[a] Surveyed. [b] Partly in Idaho.
[c] Partly surveyed [d] Outboundaries surveyed.

(Filed Jun. 24, 2013)

REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR THE FISCAL YEAR ENDED JUNE 30

1909

[SEAL]

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1909

* * *

[132] TABLE 47. – *Schedule showing each Indian reservation, under what agency or school, tribes occupying or belonging to it, area not allotted or specifically reserved, and authority for its establishment* – Continued

Name of reservation and tribe.	Area (unallotted).	Date of treaty, law, or other authority establishing reserve.
NEBRASKA – continued.	*Acres.*	
Omaha..... (Under Omaha School.) Tribe: Omaha	[a]12,421	Treaty of Mar. 16, 1854, vol. 10, p. 1043; selection by Indians with President's approval, May 11, 1855; treaty of Mar. 6, 1865, vol. 14, p. 667;

		acts of June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18, p. 170, deed to Winnebago Indians dated July 31, 1874; act of Aug. 7, 1882, vol. 22, p. 341; act of Mar. 3, 1893 (27 Stats., p. 612); 129,470 acres allotted to 1,577 Indians; the residue, 12,421 acres, unallotted.
Ponca..... (Under Santee School.) Tribe: Ponca.	.....	Treaty of Mar. 12, 1858, vol. 12, p. 997, and supplemental treaty, Mar. 10, 1865, vol. 14, p. 675; act of Mar. 2, 1889, sec. 13, vol. 25, p. 892. 27,202.08 acres allotted to 167 Indians; 160 acres reserved and occupied by agency and school buildings. (See letter book 205, p. 339, also President's proclamation, Oct. 23, 1890, vol. 26, p. 1559.)
Sioux (additional)..... (Under Pine Ridge Agency.) Tribe: Oglala Sioux.	640	Executive order, Jan. 24, 1882.

Winnebago ..... (Under Winnebago School.) Tribe: Winnebago.	[c]1,711	Act of Feb. 21, 1863, vol. 12, p. 658; treaty of Mar. 8, 1865, vol. 14, p. 671; act of June 22, 1874, vol. 18, p. 170; deed from Omaha Indians dated July 31, 1874. (See vol. 6, Indian deeds, p. 215.) 106,040.82 acres allotted to 1,200 Indians; 480 acres reserved for agency, etc.; the residue, 1,710.80 acres, unallotted.
Total	14,772	
NEVADA.		
Duck Valley[b] ..... (Under Western Shoshoni School.) Tribes: Paiute and Western Shoshoni.	[c]312,320	Executive orders, Apr. 16, 1877, and May 4, 1886
Moapa River..... (Under Moapa farmer.) Tribes: Chemehuevi, Kaibab, Pawipit, Paiute, and Shivwits.	[c]1,000	Executive orders, Mar. 12, 1873, and Feb. 12, 1874; act of Mar. 13, 1875, vol. 18, p. 445, selection approved by Secretary of the Interior, July 3, 1875; Executive order of July 31, 1903.

Pyramid Lake .... (Under Nevada School.) Tribe: Paiute.	'322,000	Executive order, Mar. 23, 1874. (See sec. 26, Indian appropriation act, approved Apr. 20, 1904, vol. 33, p. 225.)
Walker River..... (Under Carson School.) Tribe: Paiute.	.....	Executive order, Mar. 19, 1874; joint resolution of June 19, 1902, vol. 32, p. 744; act of May 27, 1902 (32 Stat., pp. 245-260); act of Mar. 3, 1903, vol. 32, pp. 982-997; act of June 21, 1906, vol. 34, p. 325; proclamation of President, Sept. 26, 1906, opening ceded part to settlement. It contains 268,005.84 acres, leaving in diminished reserve 50,809.16 acres. Allotted to 492 Indians, 9,783.25 acres; reserved for agency and school, 80 acres; reserved for cemetery, 40 acres; reserved for grazing, 37,390.29 acres; reserved for timber, 3,355.62 acres; reserved for church purposes, 160 acres. (L. B. 885, p. 187.) Subject to disposition under President's proclamation, 268,005.84 acres.
Total	635,320	

NEW MEXICO		
Jicarilla Apache ... (Under Jicarilla School.) Tribe: Jicarilla Apache.	[c]286,400	Executive orders Mar. 25, 1874, July 18, 1876, Sept. 21, 1880, May 15, 1884, and Feb. 11, 1887. 129,313.35 acres allotted to 845 Indians, and 280.44 acres reserved for mission, school, and agency purposes. (L. B. 335, p. 323.) The residue, 286,400 acres, unallotted. Lands now in process of allotment. (See executive order of Nov. 11, 1907.) The above-mentioned 845 allotments have been canceled; reallotments have been made under the act of Mar. 1, 1907 (34 Stat. L., 1413). (See 64513-1909.) (Allotments 1 to 797 were approved Aug. 28, 1909, and are not included in this report.)
Mescalero Apache..... (Under Mescalero School.)	[c]474,240	Executive orders, May 29, 1873, Feb. 2, 1874, Oct. 20, 1875, May 19, 1882, and Mar. 24, 1883. (See 25961, 48680, 75169-

(Filed Jun. 24, 2013)

REPORTS OF THE

DEPARTMENT OF THE INTERIOR

FOR THE FISCAL YEAR ENDED JUNE 30

1911

ADMINISTRATIVE REPORTS

IN 2 VOLUMES

VOLUME II

INDIAN AFFAIRS
TERRITORIES

[SEAL]

WASHINGTON : GOVERNMENT
PRINTING OFFICE : 1912

* * *

[82] TABLE 5. – *General data for each Indian reservation, under what agency or school, tribes occupying or belonging to it, area not allotted or specially reserved, and authority for its establishment* – Continued

Name of reservation and tribe.	Area (unallotted).	Date of treaty, law, or other authority establishing reserve.
NEBRASKA – continued.	*Acres.*	
Omaha..... (Under Omaha School.) Tribe: Omaha	4,500	Treaty of Mar. 16, 1854, vol. 10, p. 1043; selection by Indians with President's approval, May 11,

		1855; treaty of Mar. 6, 1865, vol. 14, p. 667; acts of June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18, p. 170; deed to Winnebago Indians dated July 31, 1874; act of Aug. 7, 1882, vol. 22, p. 341; act of Mar. 3, 1893 (27 Stats., p. 612); 130,522 acres allotted to 1,458 Indians; the residue, 4,500 acres, unallotted.
Ponca..... (Under Santee School.) Tribe: Ponca.	.....	Treaty of Mar. 12, 1858, vol. 12, p. 997, and supplemental treaty, Mar. 10, 1865, vol. 14, p. 675; act of Mar. 2, 1889, sec. 13, vol. 25, p. 892. 27,236 acres allotted to 168 Indians; 160 acres reserved and occupied by agency and school buildings. (See letter book 205, p. 339; also President's proclamation, Oct. 23, 1890, vol. 26, p. 1559.)
Sioux (additional)..... (Under Pine Ridge School.) Tribe: Oglala Sioux.	640	Executive order, Jan. 24, 1882.

Winnebago ..... (Under Winnebago School.) Tribe: Winnebago.	700	Act of Feb. 21, 1863, vol. 12, p. 658; treaty of Mar. 8, 1865, vol. 14, p. 671; act of June 22, 1874, vol. 18, p. 170; deed from Omaha Indians dated July 31, 1874. (See vol. 6, Indian deeds, p. 215.) 122,254 acres allotted to 1,558 Indians; 480 acres reserved for agency, etc.; the residue, 700 acres, unallotted.
Total	5,840	
NEVADA.		
Duck Valley..... (Under Western Shoshoni School.) Tribes: Paiute and Western Shoshoni.	[1]321,920	Executive orders, Apr. 16, 1877, May 4, 1886, and July 1, 1910.
Moapa River..... (Under Moapa River School.) Tribes: Chemehuevi, Kaibab, Pawipit, Paiute, and Shivwits.	[2]1,000	Executive orders, Mar. 12, 1873, and Feb. 12, 1874; act of Mar. 13, 1875, vol. 18, p. 445, selection approved by Secretary of the Interior, July 3, 1875; Executive order of July 31, 1903.

Paiute..... (Under Fallon School.)	1,100	7¼ sections (4,640 acres) reserved under second form withdrawal, reclamation act June 17, 1902 (32 Stat. 388), for reallotment to Indians; 3,540 acres have been allotted to 354 Paiute Indians and 10 acres reserved for school purposes (see 76982-1907), 1,100 acres unallotted and unreserved.
Pyramid Lake .... (Under Nevada School.) Tribe: Paiute.	322,000	Executive order, Mar. 23, 1874. (See sec. 26, Indian appropriation act, approved Apr. 21, 1904, vol. 33, p. 225.) Act July 1, 1898 (30 Stat., 594).
Walker River..... (Under Walker River School.) Tribe: Paiute.	40,746	Executive order, Mar. 19, 1874; joint resolution of June 19, 1902, vol. 32, p. 744; act of May 27, 1902 (32 Stat., pp. 245-260); act of Mar. 3, 1903, vol. 32, pp. 982-997; act of June 21, 1906, vol. 34, p. 325; proclamation of President, Sept. 26, 1906, opening ceded part to settlement. It contains 268,005.84 acres, leaving in diminished reserve 50,809.16 acres.

		Allotted to 490 Indians, 9,763.27 acres; reserved for agency and school, 80 acres; reserved for cemetery, 40 acres; reserved for grazing, 37,848.29 acres; reserved for timber, 3,355.62 acres; reserved for church purposes, 160 acres. (L. B. 885, p. 187.)
Total	686,766	
NEW MEXICO		
Jicarilla Apache ... (Under Jicarilla School.) Tribe: Jicarilla Apache.	407,300	Executive orders Mar. 25, 1874, July 18, 1876, Sept. 21, 1880, May 15, 1884, and Feb. 11, 1887; 129,313.35 acres allotted to 845 Indians, and 280.44 acres reserved for mission, school, and agency purposes. (L. B. 335, p. 323.) Executive orders of Nov. 11, 1907 and Jan. 28, 1908. The above-mentioned 845 allotments have been canceled; reallotments have been made under the act of Mar. 1, 1907 (34 Stat. L., 1413).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

NATIONAL ARCHIVES
MICROFILM PUBLICATIONS

Microfilm Publication M1011

SUPERINTENDENTS' ANNUAL NARRATIVE
AND STATISTICAL REPORTS FROM FIELD
JURISDICTIONS OF THE BUREAU OF
INDIAN AFFAIRS, 1907-1938

Roll 170

Winnebago, 1920-35

Winslow Sanatorium, 1934, 1935

Wittenberg School, 1910-17

[SEAL]

THE NATIONAL ARCHIVES
NATIONAL ARCHIVES AND RECORDS SERVICE
GENERAL SERVICES ADMINISTRATION

WASHINGTON: 1975

* * *

1935 Annual Statistical Report Office of Indian Affairs

Section III. Land

State **Nebraska** Reservation **Omaha**

Agency or Jurisdiction **Winnebago Agency**.

PART I Reservation Additions and Subtractions

1. Area of original reservation, acres ..... 300,000.00 A.
2. Additions to reservation, 1/, acres 0
3. Reductions from reservation other than allotments, 1/, acres.....162,504.53 A.

1/ For all changes in area of reservation cite the Act or Acts of Congress, the Executive Order, etc. The number of acres for each change must be given below.

Additions Date Acres	Reductions	Date	Acres
	Sale to Winnebagoes	1865	100,000.00
	Sale to Winnebagoes-Act of 6/22/1874		12,347.53 A.
	Sale – Land W.of R.R.		50,157.00 A.

Compiled by _____ Verified by _____

Clerk.

1935 Annual Statistical Report

Office of Indian Affairs

Section III Land

State **Nebraska** Reservation **Omaha**

Agency or jurisdiction **Winnebago Agency**

PART 3. Land Ownership and use, as of January 1, 1935.

1. Date reservation was originally established. : Year : :Month: : Day :
: : : :

2. How reservation was established – State fully if by treaty, by agreement, by Executive Order, by Act or Acts of Congress, by purchase, etc.

Treaties of 1830 and 1836.
Treaty of 1865.

	Total all land	Agricultural land: Non-irrigable	Agricultural land: Irrigable.	Agricultural land: Grazing land.	Agricultural land: Other land.
	Acreage				
3. Allotted land. 1/	135495.47	All classed as Agricultural			
a. Passed to non-Indian ownership	108510.71				
b. Owned by Indians, now unrestricted (patent in fee, certificates of competency, etc.)	360.-				
c. Land held in trust, total (1)+(2)	26624.76				
(1) For living allottees	1480.-				
(2) For deceased allottees	25144.76				
4. Tribal lands remaining, total (a+b)	2000.-				
a. Reserved for use of Agency, School, etc. 2/	55.-				
b. Reserved for use of tribe. 3/	1945.-				
	Number of Allotments				
5. Number of allotments 4/	1931				
a. Passed to white ownership	1545				
b. Owned by Indians, now unrestricted	5				
c. Now held in trust, total (1)+(2)	381				
(1) For living allottees	19				
(2) For deceased allottees	362				

Compiled by _____
Clerk.

Verified by _____

(See notes on back of page.)

No. 14-1406

In The
Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX, VOLUME III

JAMES D. SMITH
Solicitor General
of Nebraska
OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov
Counsel of Record
for Petitioners

DONALD B. VERRILLI, JR.
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel of Record for
Respondent United States

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Avenue, N.W.,
Seventh Floor
Washington, D.C. 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel of Record for
Tribal Respondents

Petition For Certiorari Filed May 27, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

VOLUME III

Declaration of Emily Greenwald, filed June 24, 2013 543

1905 Title Map of the Omaha Reservation, filed June 24, 2013 551

1885 Map of Omaha and Winnebago Reservations (for illustrative purposes), filed June 24, 2013 552

Act of February 28, 1899, 30 Stat. 912, filed June 24, 2013 553

Declaration of V. Gene Summerlin, filed June 24, 2013 559

1964 Bureau of Indian Affairs Maps, filed June 24, 2013 562

Rebuttal Expert Report submitted by Emily Greenwald, Ph.D., Historical Research Associates, Inc., filed June 24, 2013 565

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1884, filed June 24, 2013 612

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1871 616

Letter from the Secretary of the Interior to Congress, January 19, 1872, filed June 24, 2013 622

Act of June 10, 1872, 17 Stat. 391, filed June 24, 2013 631

TABLE OF CONTENTS – Continued

Page

Letter from the Commissioner of Indian Affairs, October 12, 1872, filed June 24, 2013 636

Excerpts from 13 Cong. Rec. 1282 (1882), filed June 24, 2013 640

Excerpts from 13 Cong. Rec. 3027-32 (1882), filed June 24, 2013 643

Excerpts from 13 Cong. Rec. 6383-84 (1882), filed June 24, 2013 685

Excerpts from 13 Cong. Rec. 6537-42 (1882), filed June 24, 2013 696

Excerpts from 13 Cong. Rec. 6571-73 (1882), filed June 24, 2013 736

Excerpts from 13 Cong. Rec. 6628 (1882), filed June 24, 2013 752

H. Rep. No. 1530, 47th Cong., 1st Sess. July 1, 1882, filed June 24, 2013 754

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1885, filed June 24, 2013 794

Report of Omaha and Winnebago Agency August 26, 1890, filed June 24, 2013 798

Report of Omaha and Winnebago Agency September 1, 1892, filed June 24, 2013 817

Report of Omaha and Winnebago Agency August 24, 1897, filed June 24, 2013 829

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

EXHIBIT B

IN THE OMAHA TRIBAL COURT
FOR THE OMAHA TRIBE OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs, v. MITCHELL PARKER, In his official Capacity as Member of the Omaha Tribal Council, AMEN SHERIDAN, In his official Capacity as Vice-Chairman of the Omaha Tribal Council, RODNEY MORRIS, In his Official capacity as Secretary of the Omaha Tribal Council, TIM GRANT, In his official Capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member	Civ. No. 08-002 **DECLARATION OF EMILY GREENWALD**

of the Omaha Tribal Council,)
and ANSLEY GRIFFIN, In his)
official capacity as Chairman)
of the Omaha Tribal Council)
and as the Omaha Tribe's)
Director of Liquor Control,)
Defendants.)

Emily Greenwald, declares under penalty of perjury that the following is true:

1. I am over the age of majority, am competent to testify, and I have personal knowledge of the matters addressed in this Declaration. This declaration is submitted pursuant to 28 U.S.C. § 1746 in support of Plaintiffs' Motion to For Summary Judgment.

2. Paragraph 46[1] of the Defendants' Statement of Undisputed Material Facts in Defendants' Brief in Support of Motion for Summary Judgment states that there "were at least 15 allotments west of the railroad right of way made to Omaha tribe members prior to any sales to non-Indians."

3. The 1905 title map shows that of the fifteen allotments taken by members of the Omaha Indian Tribe west of the railroad right of way, ten allotments were fully or largely west of the right of way and five

[1] All subsequent references to paragraph numbers refer to the statement of facts in Defendants' Brief in Support of Defendants' Motion for Summary Judgment.

were mostly east of the right of way. Attached as Exhibit A is a true and accurate copy of the 1905 title map. The total acreage open to settlement west of the railroad right of way was 50,157 acres (ARCIA at XLVIII (1884), E. Greenwald Rpt. at 18 n.85, Pls. Ex. 10), while the total acreage of allotments taken by members of the Omaha Indian Tribe west of the right of way was 876.60. (ARCIA at XLIX (1884), E. Greenwald Rpt. at 18 n.85, Pls. Ex. 10.) Allotments west of the railroad right of way taken by members of the Omaha Indian Tribe represent approximately 1.72% of the total acreage west of the right of way.

4. Paragraph 53 asserts that Agent George Wilkinson contradicted his proclamation that the Omahas "reduced their reservation by selling 50,000 acres west of the Sioux City and Omaha Railroad to actual settlers" when he stated the reservation extended twenty five miles west of the Missouri River. The report of Agent Wilkinson was made from the "Omaha and Winnebago Agency" and indicated that the combined reservations of the Omaha and Winnebago Tribes encompassed an area "18 by 25 miles in extent, on the West Bank of the Missouri River. This land was reserved by the Omahas when they ceded to the Government what is now the State of Nebraska, and was held by them alone until the Winnebagoes were removed from Minnesota to Crow Creek, Dakota Territory, and from there they drifted down to the Omahas. [paragraph break] The Government later purchased the north part of the Omaha Reservation for a home for the Winnebagoes." The borders of

the combined Omaha and Winnebago Reservations are approximately 18 miles north to south, and the east to west width of the Winnebago Reservation is approximately 25 miles from the Missouri River to the western boundary of the Winnebago Reservation. Wilkinson does specifically report that "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder." (ARCIA at 135 (1885), E. Greenwald Rpt. at 19 n.88, Pls.' Ex. 10.)

5. A line 25 miles west of the Missouri river would not closely correspond with the original western boundary of the Omaha Reservation, but would fall in the middle of the area sold in the 1882 Act. Attached as Exhibit B is a true and accurate copy of an 1885 Map with a superimposed trend line showing the approximate demarcation of a line twenty-five miles west of the Missouri River.

6. Paragraph 54 asserts that missionary John Copley stated that the "west end of the reserve extends eight or nine miles west of Bancroft" and that area would "obviously" encompass the lands west of the railroad. (Defs.' Ex. 22.)

7 As reflected in Exhibit B, a line eight or nine miles west of Bancroft would not correspond to the original western boundary, but would fall in the middle of the area sold in the 1882 Act.

8. Paragraph 55 asserts a letter from Presbyterian minister William Hamilton reported that the

Sioux City and Omaha Railroad ran "through" the reserve, implying that the reference to the "reserve" is a reference to the Omaha Reservation. (Defs.' Ex. 22)

9. Hamilton's letter primarily involved his attempt to find a location to set up his residence as a missionary to the Winnebago Indian Tribe. He referred to the town of Randolph as being "on the Railroad, lately built through the western part of the reserve." Randolph, Nebraska lies northwest of the Winnebago Reservation, and Hamilton's reference to the "western part of the reserve" likely refers to the Winnebago Reservation, not the Omaha Reservation. (*See* Defs.' Ex. 22 at "RDE01185".)

10. Paragraph 57 cites references by Agent W. A. Mercer and Agent Charles Matthewson to a western boundary 30 miles from the Missouri River as well as a report that the Omaha Reservation was "140,000 acres" as support for the position that land sold in the 1882 Act was still a part of the Omaha Reservation.

11. Agent Mercer's description of the boundary extending 30 miles west of the Missouri River specifically referred to "[t]he Omaha and Winnebago reservations." (ARCIA at 178 (1897), E. Greenwald Rebuttal Rpt. at 21 n.88, Pls.' Ex. 11.) Agent Mercer also stated that the reservations "embrace all of Thurston County, ***except*** a portion of the reservation which has been sold and is now occupied by the white purchasers." (*Id.* (emphasis added).)

12. Agent Matthewson was also referring to both the Omaha and Winnebago reservations in his description of "[t]his reservation" as "having an east front on the Missouri River of 18 miles and extending west 30 miles, embracing 250,000 acres." (ARCIA at 231 (1899), Defs.' Ex. 24.) Matthewson's report of 250,000 acres as the total reservation acreage is consistent with the combined acreage of the Winnebago and Omaha Reservations, which represents the original 300,000 acres of the Omaha Reservation (a portion of which became the Winnebago Reservation) less the 50,000 acres opened for sale and settled under the 1882 Act.

13. Agent Matthewson's reference to "the southern portion of the reservation [as] containing about 140,000 acres . . . occupied by the Omahas" is also consistent with the reported acreage of the Omaha Reservation less the land sold to the Winnebago and less the 50,000 acres opened for settlement pursuant to the 1882 Act as shown below:

(a) Original Omaha Reservation 300,000 acres (Office of Indian Affairs (Winnebago Agency), Annual Statistical Report for the Omaha Reservation at 11 (1935), E. Greenwald Rebuttal Rpt at 2 n.3, Pls.' Ex. 11.)

(b) Less 1st Sale to Winnebago Tribe: 300,000 acres – 97,500 acres = 202,500 acres. (Defs' Ex. 4, p. 17.)

(c) Less 2nd Sale to Winnebago Tribe: 202,500 acres – 12,374 acres = 190,126 acres. (ARCIA at 202

(1874), E. Greenwald Rpt. at 11 n.44, Pls' Ex. 10; Office of Indian Affairs (Winnebago Agency), Annual Statistical Report for the Omaha Reservation at 11 (1935), E. Greenwald Rpt. at 11 n.45, Pls.' Ex. 10.)

(d) Less Sale of land west of right of way: 190,126 – 50,000 acres = 140,126 acres remaining in Omaha Reservation.

14. The Defendants' statement that Agent Mattewson's statement that the Omaha Reservation encompassed 140,000 acres "which obviously included the lands west of the railroad right of way" is patently incorrect.

15. Paragraph 58 states Secretary Ethan Allen Hitchcock ruled that settlers who purchased land west of the railroad right of way were not subject to homestead legislation because they were settled on lands "in the Omaha reservation." This statement implies that Secretary Hitchcock made a legal determination that the land was located in the Omaha Reservation and that the location was legally relevant to his opinion.

16. Secretary Hitchcock based his opinion that the 1900 Act did not apply to settlers who took their land under the 1882 Act because the specific terms of the 1882 Act were different than the Homestead Act. He did not base his opinion on whether the lands were legally part of the reservation, but used the terms "in the Omaha reservation" simply as a descriptive reference to location, rather than a legal

finding that the lands where located within the reservation's boundaries. (Defs.' Ex. 25.)

17. Paragraph 59 refers to the Act of February 28, 1899 authorizing a railway to be constructed through the Omaha and Winnebago Reservation in Nebraska. This Act has nothing to do with the railroad right of way that marked the western boundary of the Omaha Reservation.

18. The Act of February 28, 1899 authorized a railway starting in Decatur, Nebraska and running northwest through the Omaha reservation. Decatur, Nebraska is located near the southeastern corner of the Omaha Reservation near the Missouri River. Any railway starting in Decatur and running in a northwesterly direction (which is also generally along the path followed by the Missouri River) would run through the Omaha and Winnebago Reservations, but would not traverse through the area opened for settlement pursuant to the 1882 Act. Attached as Exhibit C is a true and accurate copy of the February 28, 1899 Act. (Act of Feb. 28, 1899, 30 Stat. 912)

19. I declare under penalty of perjury that the foregoing is true and correct. Executed on: August 31, 2012.

/s/ Emily Greenwald
Emily Greenwald

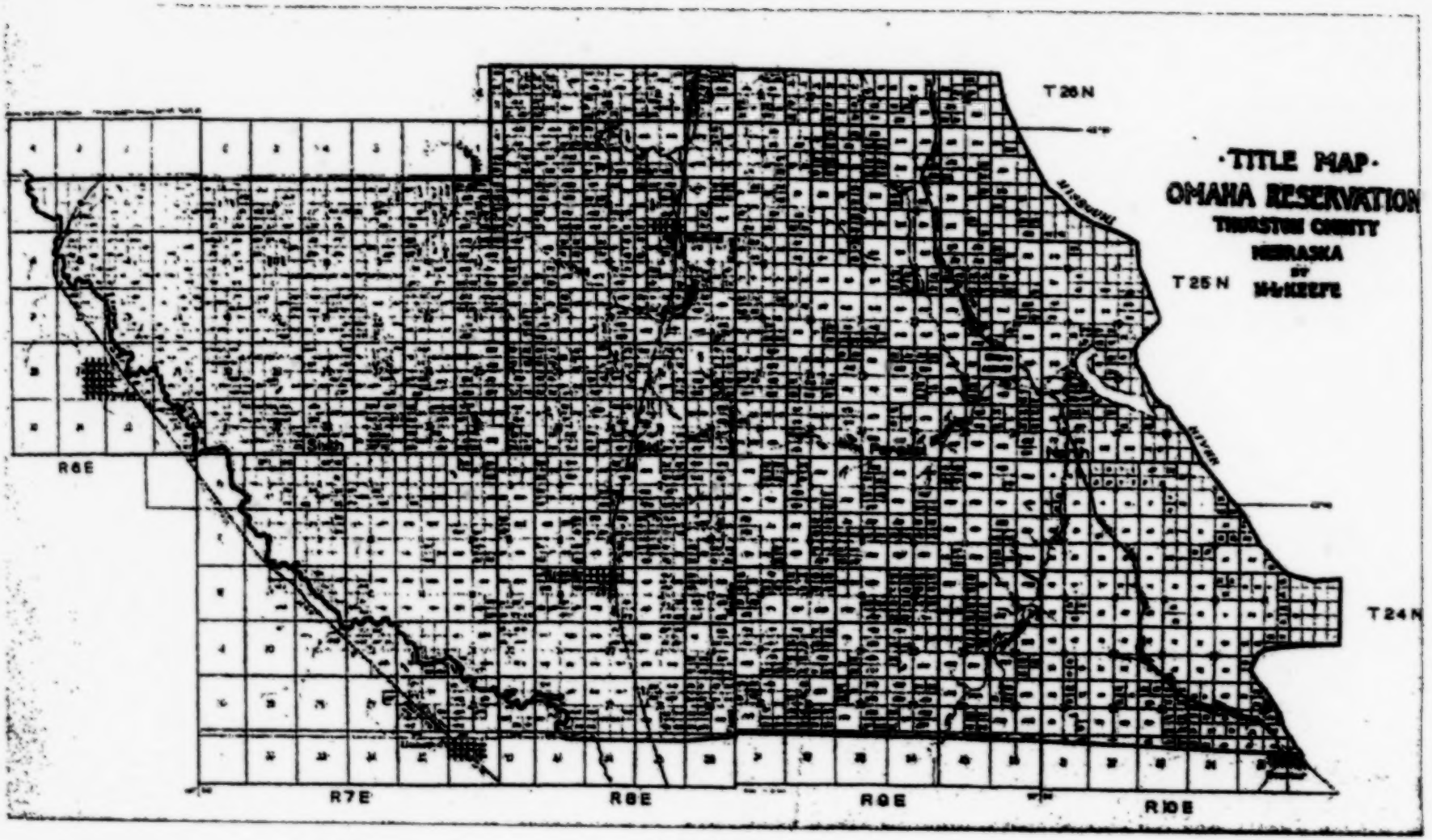
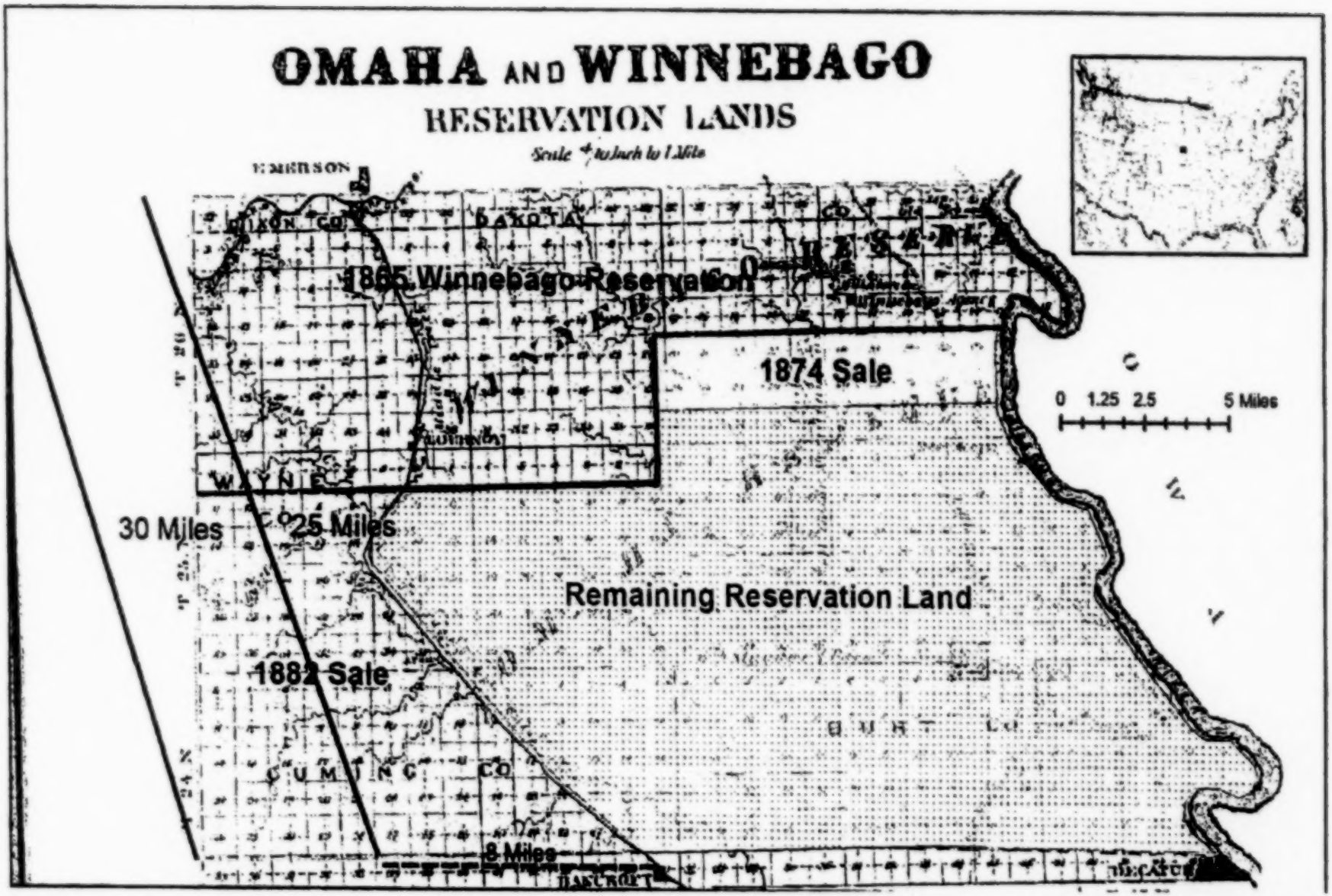

·TITLE MAP·
OMAHA RESERVATION
THURSTON COUNTY
NEBRASKA
BY
McKEEFE
T 26 N
T 25 N
T 24 N
R6E
R7E
R8E
R9E
R10E
MISSOURI
RIVER

Exhibit A



This map was created in ARC GIS using an 1885 map of the Omaha and Winnebago lands to locate the general course of the Missouri, River at that point in time. The 25-mile and 30-mile lines are generalized, created by plotting distance points due west of the river and then using them to create a trend line (unscientific, used for illustrative purposes).

Exhibit B

FIFTY-FIFTH CONGRESS.

SESS. III.

CH. 224, 225.

1899

[912] **CHAP. 225.** – An Act Authorizing the Sioux City and Omaha Railway Company to construct and operate a railway through the Omaha and Winnebago Reservation, in Thurston County, Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Sioux City and Omaha Railway Company, a corporation created under and by virtue of the laws of the State of Nebraska, be, and the same is hereby, authorized and invested and empowered with the right of locating, constructing, owning, equipping and operating, using and maintaining a railway and telegraph and telephone line through the Omaha and Winnebago Reservation in Nebraska, beginning at a point to be selected by said railway company at or near the town of Decatur, Burt County, Nebraska, and running thence in a northerly and westerly direction, over the most practicable and feasible route, through the Omaha and Winnebago Reservation, to a point on the north line of the Omaha and Winnebago Reserve, in Thurston County, with the right to construct, use, and maintain such tracks, turn-outs, sidings, and extensions as said company may deem to its interests to construct and maintain

along and upon the right of way and depot grounds herein provided for.

SEC. 2. That said corporation is authorized to take and use, for all purposes of a railway, for its main line and branch line, and for no other purpose, a right of way one hundred feet in width through said Omaha and Winnebago Reservation, and to take and use a strip of land two hundred feet in width, with a length of three thousand feet, in addition to the right of way, for stations, for every ten miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill: *Provided*, That no more than said addition of land shall be taken for any one station: *Provided further*, That no part of the lands herein authorized to be taken shall be sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railway, telegraph, and telephone lines; and when any portion thereof shall [913] cease to be used, such portion shall revert to the Omaha and Winnebago tribes of Indians from whom the same shall have been taken.

SEC. 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of said Omaha and Winnebago tribes of Indians through

which it may be constructed, or by allotments under any law of the United States or agreement with the Indians, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed, one (who shall act as chairman) by the Indian agent of the Government stationed at the agency of the Omaha and Winnebago Reservation, one by the chief of the tribe to which said occupant belongs, or, in case of an allottee, by said allottee or by his duly authorized guardian or representative, and one by said railway company, who, before entering upon the duties of their appointment, shall take and subscribe, before a district judge, clerk of a district court, or United States commissioner, an oath that they will faithfully and impartially discharge the duties of their appointment; which oath, duly certified, shall be returned with their award to and filed with the Secretary of the Interior within sixty days from the completion thereof; and a majority of said referees shall be competent to act in case of the absence of a member, after due notice. And upon the failure of either party to make such appointment within thirty days after the appointment made by the President, the vacancy shall be filled by the district judge of any United States court in the State of Nebraska, upon the application of the other party. The chairman of said board shall appoint the time and place for all hearings within the tribe to which

such occupant belongs. Each of said referees shall receive for his services the sum of three dollars per day for each day he is engaged in the trial of any case submitted to them under this Act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said State of Nebraska. Costs, including compensation of the referees, shall be made a part of the award, and be paid by such railway company. In case the referees can not agree, then any two are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right, within ninety days after making the award and notice of the same, to appeal by original petition to any district court in the State of Nebraska, which court shall have jurisdiction to hear and determine the subject-matter of said petition. If, upon hearing of the appeal, the judgment of the court shall be for a larger sum than the award of the referees, the cost of said appeal shall be adjudged against the railway company. If the judgment of the court shall be for the same sum as the award of the referees, then the cost shall be adjudged against the appellant. If the judgment of the court shall be for a smaller sum than the award of the referees then the cost shall be adjudged against the party claiming damages. When proceedings have been commenced in court, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway.

SEC. 4. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular tribes or individuals through whose lands said line may be located, the sum of fifty dollars, in addition to compensation provided for in this Act, for property taken and damage done to individual occupants by the construction of the railway, for each mile of railway that it may construct in said Omaha and Winnebago Reservation, said payments to be made in installments of one hundred dollars as each ten miles of road is graded: *Provided*, That if the general council of either of the tribes through whose land said railway may be located shall, within four months after the filing of maps of definite location, as set forth in section five of this Act, dissent from [914] the allowance provided for in this section, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting tribes under the provisions of this Act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of the lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by the said railway company for dissenting tribes shall be in lieu of the compensation that said tribes would be entitled to receive under the foregoing provisions. Said railway company shall have the right to survey and locate its railway immediately after the passage of this Act.

SEC. 5. That said company shall cause maps showing the entire route of its located lines through

the said Omaha and Winnebago Reservation to be filed in the office of the Secretary of the Interior, which maps shall be approved by said Secretary before any rights shall vest in said company under this Act. After the filing of said maps and approval thereof by the Secretary of the Interior no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company: *Provided*, That when a map showing said railway company's located line is filed and approved, as herein provided for said company shall commence grading said located line within six months thereafter, or such location shall be void.

SEC. 6. That said railway company shall build at least ten miles of its railway in said Omaha and Winnebago Reservation within two years after the passage of this Act, and complete the remainder thereof within three years thereafter, or the rights herein granted shall be forfeited as to that portion not built; that said railway company shall construct and maintain continually all fences, road and highway crossings, and necessary bridges over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way or may be by the proper authorities laid out across the same.

SEC. 7. That Congress may at any time amend, add to, or alter this Act.

Approved, February 28, 1899.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

EXHIBIT C

IN THE OMAHA TRIBAL COURT
FOR THE OMAHA TRIBE OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN, Plaintiffs, v. MITCHELL PARKER, In his official Capacity as Member of the Omaha Tribal Council, AMEN SHERIDAN, In his official Capacity as Vice-Chairman of the Omaha Tribal Council, RODNEY MORRIS, In his Official capacity as Secretary of the Omaha Tribal Council, TIM GRANT, In his official Capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member of	Civ. No. 08-002 **DECLARATION OF V. GENE SUMMERLIN**

the Omaha Tribal Council,)
and ANSLEY GRIFFIN, In his)
official capacity as Chairman of)
the Omaha Tribal Council and as)
the Omaha Tribe's Director of)
Liquor Control,)
Defendants.)

V. Gene Summerlin, being first duly sworn, states and testifies as follows:

1. I am over the age of majority, am competent to testify, and I have personal knowledge of the matters addressed in this Declaration. I am licensed to practice law in the State of Nebraska and before this Court. I serve as legal counsel to Plaintiffs in the above captioned case.

2. This declaration is submitted pursuant to 28 U.S.C. § 1746 in support of Plaintiffs' Motion to For Summary Judgment.

3. A true and correct copy of the April 17, 2007 restraining order of the United States District Court for the District of Nebraska in *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 is attached as Exhibit A.

4. A true and correct copy of the May 14, 2007 stipulation of the parties in United States District Court for the District of Nebraska in *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 is attached as Exhibit B.

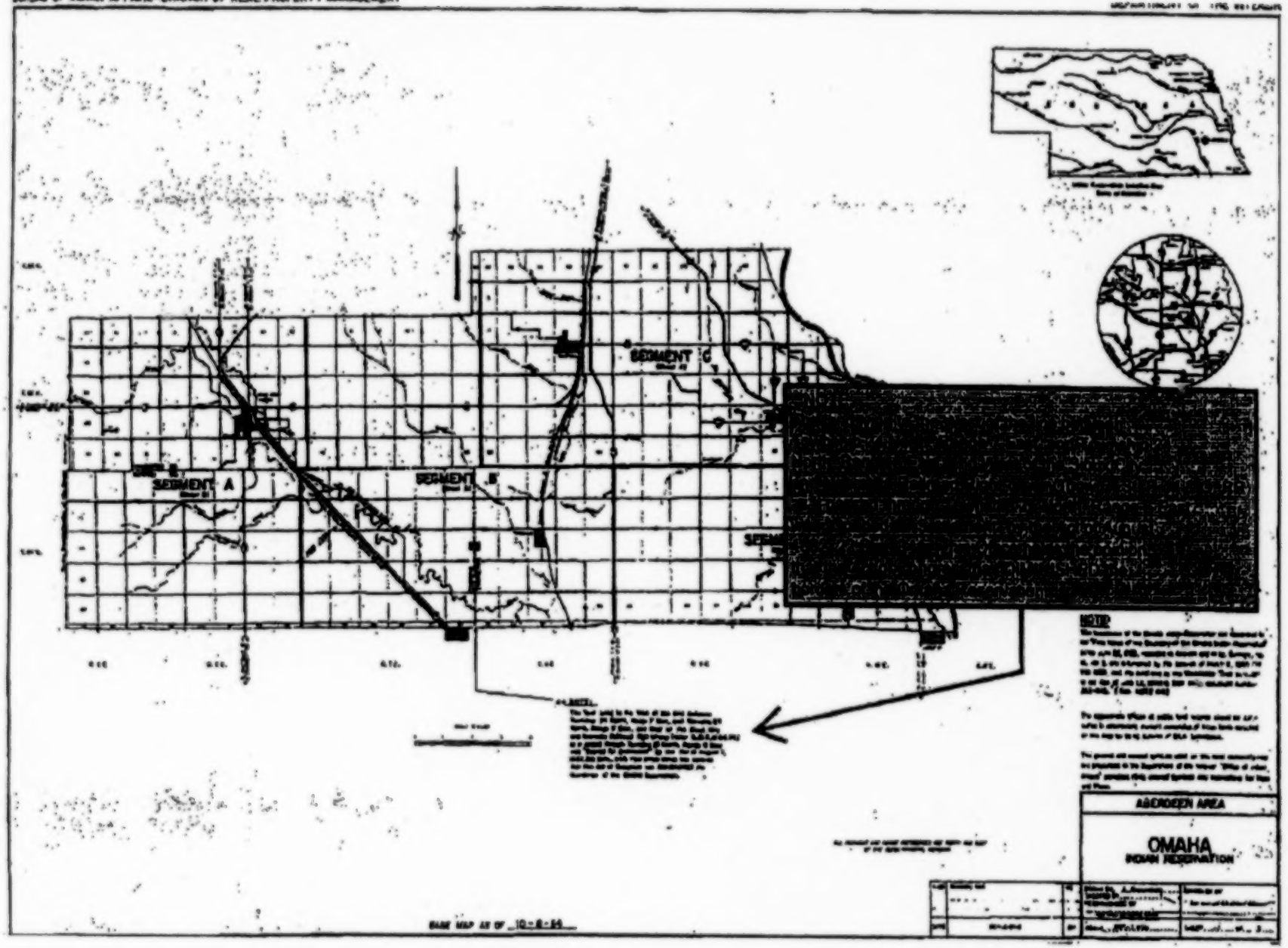
5. A true and correct copy of the October 4, 2007 order staying the proceedings to exhaust administrative remedies in Omaha Tribal Court in *Smith, et al. v. Parker, et al.*, No. 4:07CV3101 is attached as Exhibit C.

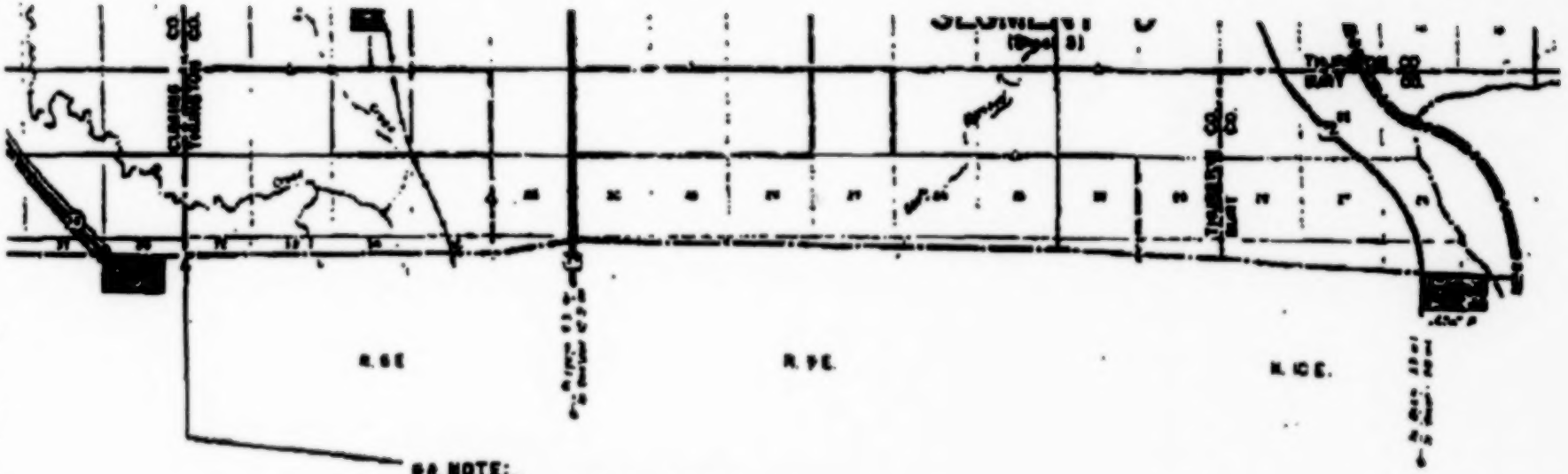
6. A true and correct copy of the report of the Secretary of the Interior found at *Freese*, 5 Dept of the Interior 708 (1887) is attached as Exhibit D.

7. A true and correct copy of a 1964 Bureau of Indian Affairs map is attached as Exhibit E. I have included a copy with a callout box containing the text of the note at the bottom.

8. I declare under penalty of perjury that the foregoing is true and correct. DATE: August 20th, 2012.

/s/ V. Gene Summerlin
V Gene Summerlin


SEGMENT A
SEGMENT B
SEGMENT C
ABERDEEN AREA
OMAHA
INDIAN RESERVATION

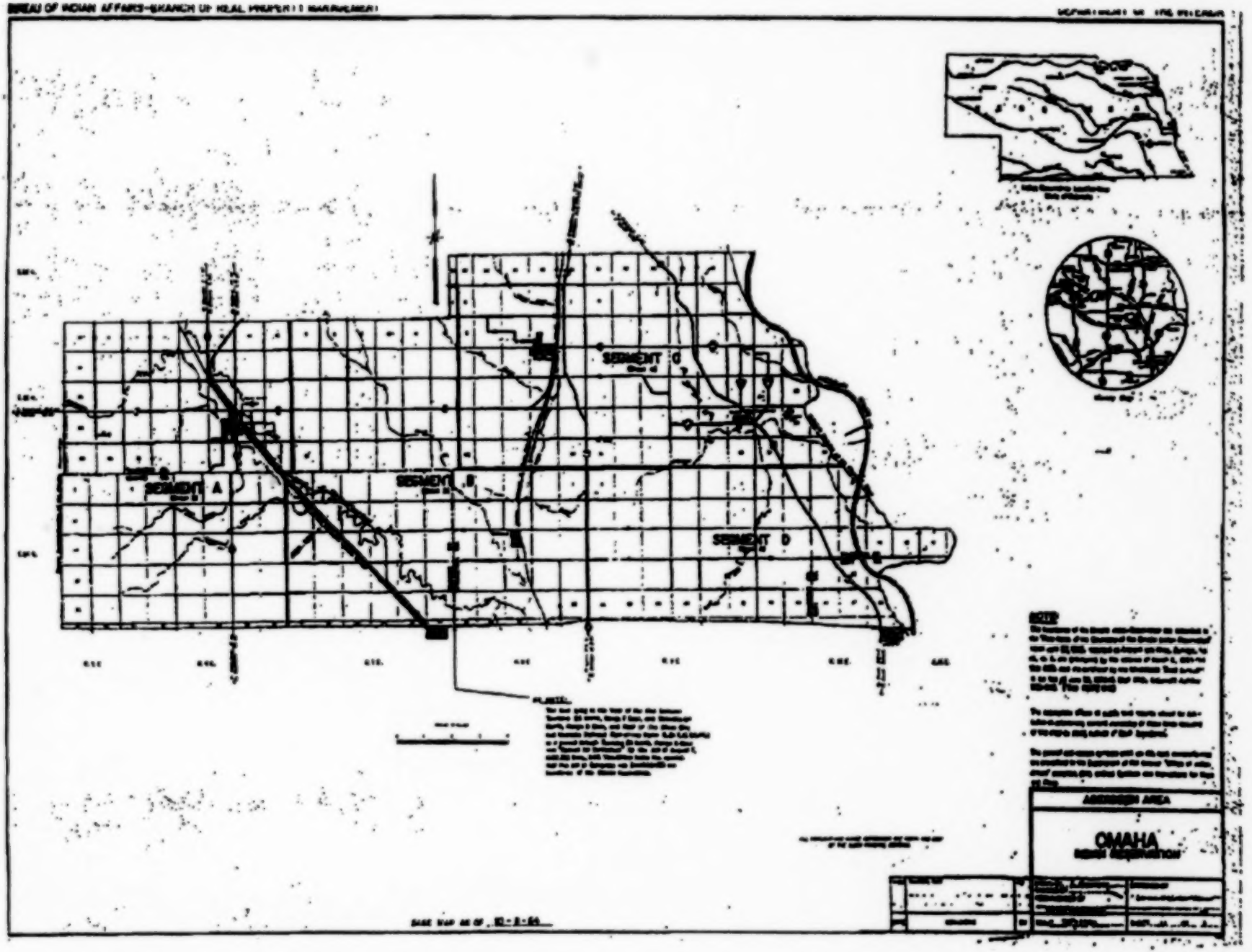


BA NOTE:

This land lying to the West of the line between Township 24 North, Range 7 East, and Township 24 North, Range 6 East, and West of the Sioux City and Nebraska Railroad Right-of-way (later C.,St.P.,M.&O.Ry.) as it passed through Township 25 North, Range 6 East was "Opened for Settlement" by the Act of August 7, 1882 (22 Stats., 340). This Office holds the opinion that the Act of Congress has DISESTABLISHED the boundaries of the Omaha Reservation.

ALL TOWNSHIP AND RANGE REFERENCES ARE NORTH AND OF THE SIXTH PRINCIPAL MERIDIAN.

BASE MAP AS OF 10-8-64


SEGMENT A
SEGMENT B
SEGMENT C
SEGMENT D
OMAHA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

EXHIBIT D

Rebuttal Report: The Western Boundary of the Omaha Indian Reservation

Submitted by

Emily Greenwald, Ph.D.
Missoula, Montana

July 3, 2012

Contents

Introduction 1
Acreage of the Omaha Reservation 1
Significance of the 1872 Act 5
Attempted Sale of Land to the Ponca Tribe 7
Congressional Intent and the 1882 Act 9
Federal Policy in 1882 15
Omaha Land Preferences 17

Allotments West of the Railroad 18

Boundary Location 21

Summary 23

Figures

Figure 1. The 1854 Omaha Reservation 3

Figure 2. Tracts affected by actions subsequent to 1854 4

Introduction

I have reviewed Dr. R. David Edmunds' expert report and rebuttal. It remains my opinion that the Bureau of Indian Affairs, the Omaha Tribe, and the residents of Pender, Nebraska, believed that the land sold pursuant to the Act of August 7, 1882, ceased to be part of the Omaha Indian Reservation.

I believe Dr. Edmunds has misinterpreted the historical evidence in a number of instances. Some of these misinterpretations do not seem relevant to the legal issues, but others are, and I have responded to them below. I have focused on the following topics:

- Acreage of the Omaha Reservation
- Relationship of the Act of June 10, 1872, to the 1882 act
- Meaning of the proposed sale of land to the Ponca Tribe
- Congressional intent

- Federal policy in 1882
- Role of Commissioner of Indian Affairs Hiram Price
- Allotments west of the railroad
- Significance of Omaha allotment choices
- Bureau of Indian Affairs statements relating to the western boundary

Although the 1882 act did not use explicit words like "cede," "diminish," or "reduce," it is my opinion that Congress and the Omaha Tribe intended the act to reduce the size of the Omaha Reservation and to move the reservation's western boundary to the Sioux City and Nebraska Railroad right of way.

Acreage of the Omaha Reservation

Dr. Edmunds argues that the Omaha reservation was not diminished because "federal statisticians seem to indicate that the Omaha reservation did not shrink after the Act of 1882. According to the BIA, the total acreage on the Omaha Indian reservation remained essentially the same."[1] He also says that the figure of 140,000 acres reported by Agent Charles Mathewson in 1899 "obviously included the lands west of the railroad."[2] Contrary to Edmunds' reading

---

[1] R. David Edmunds, "'The Best Farming Land in That Region': Land, Boundaries, and Residency on the Omaha Indian Reservation in Nebraska," May 23, 2012, 57. See also page 88.

[2] Edmunds, "'The Best Farming Land in That Region,'" 55.

of the statistics, the 140,000 acres Mathewson reported *excluded* the 50,000 acres west of the railroad. The reason the reported size of the reservation did not change after 1882 is that the BIA had regarded the reservation as having been diminished by 50,000 acres by the Act of June 10, 1872.

For my report dated August 31, 2011, I reviewed and presented Bureau of Indian Affairs (BIA) reports of the acreage within the Omaha Reservation. From 1874 onward, the BIA reported the acreage within reservation boundaries to be around 143,000 acres. It is clear from the historical record that this figure *does not* include the 50,000 acres offered for sale in 1872 and again in 1882. In other words, the BIA understood the sale area to be *outside* the reservation.

The reservation was established by treaty in 1854 and initially encompassed around 300,000 acres. It is difficult to find an accurate report of acreage before 1874, by which time several pieces had come out of the reservation. But a 1935 BIA report placed the original acreage at 300,000 acres.[3] In addition, mapping the 1854 reservation and analyzing it with GIS software yields a figure of 304,944 acres (which should be treated as an approximation). (See Figure 1.)

---

[3] Annual Statistical Report for Omaha Reservation, Winnebago Agency 1935, 11, *Superintendents' Annual Narrative and Statistical Reports from Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938*, National Archives Microfilm Publication M1011, roll 170, frame 1118.

Two tracts of land were taken out of the Omaha Reservation and were given to the Winnebago Tribe. The 1865 treaty with the Omaha Tribe effected the first of these transfers. I have not found a contemporary report of the reservation's acreage at that time. The second transfer occurred in 1874, when the Omaha Tribe agreed to sell no more than 20 sections (around 12,800 acres) from its reservation, to be added to the Winnebago Reservation. In 1876, the BIA reported the size of the Winnebago Reservation as 109,844 acres.[4] (Later reports placed the figure a little lower; it was 108,924 acres in 1884.[5])

---

[4] *Annual Report of the Commissioner of Indian Affairs for the Year 1876* (Washington: Government Printing Office, 1876), 240 [this series hereafter cited as *ARCIA* [*year*].

[5] *ARCIA 1884*, 261.

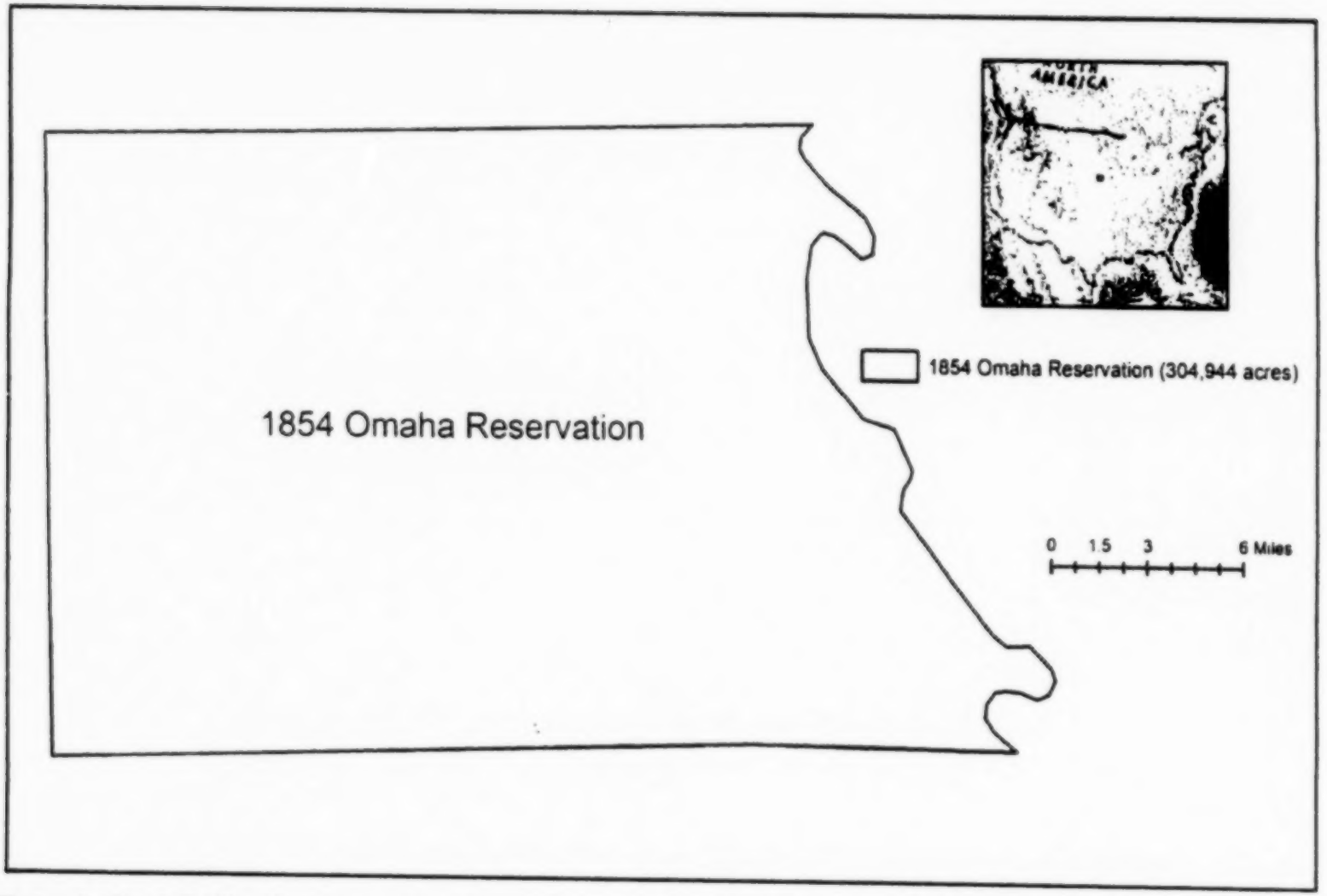


Figure 1. The 1854 Omaha Reservation. Acreage is approximate and was calculated using ArcGIS[6]

[6] HRA prepared this map in ArcGIS by lining up historic maps of the Omaha and Winnebago reservations with a GIS data layer containing townships, ranges, and sections. The maps showed the location of the Sioux City and Nebraska Railroad line, which was used to form the eastern boundary of the 1882 sale area. Approximate acreages were calculated using tools within ArcGIS. The calculated acreages are slightly higher than acreages reported in the historical record, but they correlate well with the relative sizes of the historic areas.

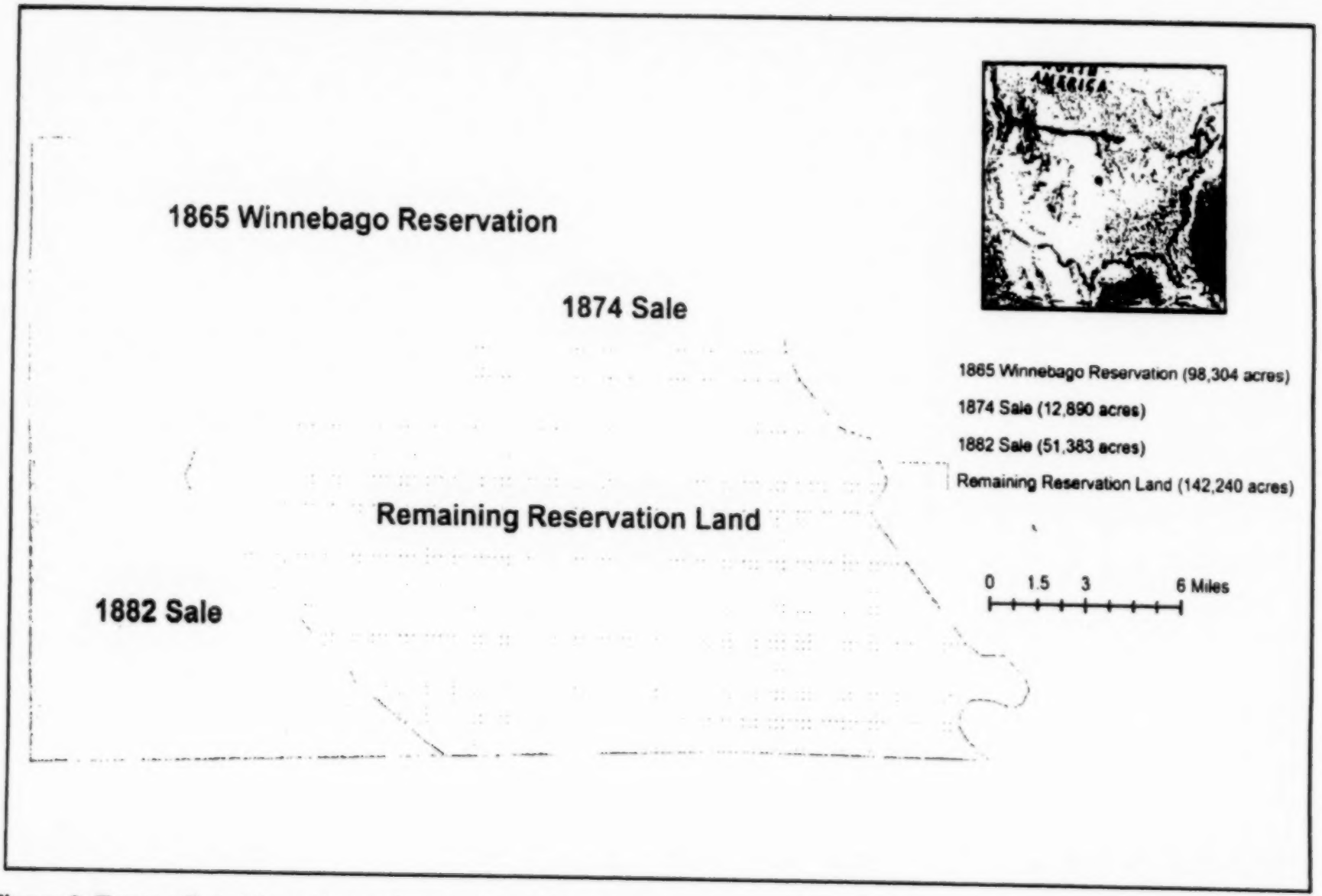


Figure 2. Tracts affected by actions subsequent to 1854. Acreages are approximated and were calculated using ArcGIS (see footnote to Figure 1).

Taking the two Winnebago tracts – roughly 109,000 acres – out of the 300,000-acre 1854 Omaha reservation leaves about 191,000 acres as of 1874. The commissioner of Indian affairs reported that year that the reservation contained 192,867 acres, but he continued, "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale in trust for said Indians, leaving 143,225 acres as their diminished reserve."[7]

For a period of time, the commissioner's annual report contained a table showing reservation acreages, including a column that listed the various instruments (treaties, acts of Congress, etc.) affecting the size of the reservation. Starting in 1876, that table listed the 1872 act as one of the instruments affecting the size of the reservation, and the size was reported as 143,225 acres.[8] In 1884, acreage was reported as 142,345, and both the 1872 act and the 1882 act were cited among the instruments.[9] A similar table from 1898 reported 77,786.63 acres allotted within the Omaha Reservation and "the residue, 64,558 acres, unallotted," totaling 142,344.63 acres. Again, both the 1872 and 1882 acts were cited as instruments.[10]

---

[7] *ARCIA 1874*, 33.

[8] It also listed the treaties of 1854 and 1865, along with the Act of June 22, 1874, and the subsequent deed of land under that act to the Winnebago Indians dated July 31, *1874. ARCIA 1876*, 240.

[9] *ARCIA 1884*, 261.

[10] *ARCIA 1898*, 572.

Significance of the 1872 Act

Although the Act of June 10, 1872, was not implemented and did not itself result in an actual diminishment of the Omaha Reservation, it provides important context for the intent of the 1882 act, which was implemented. The 1882 act, in effect, superseded the 1872 act and successfully carried out the 1872 act's goal of disposing of a portion of the reservation in order to generate revenue for the Omaha Tribe.

Congress passed the 1872 act in response to a request from the Omaha Tribe. According to Agent Edward Painter, the Omaha chiefs initially asked to sell land from "the most western portion of their reservation" in 1871.[11] This was the first of several attempts the Omahas made to sell this land. Because their first request was unsuccessful, the Omaha chiefs resubmitted their petition in October 1871. They asked for

> the sale of as near 50,000 acres of the most western portion of our reservation as can be separated from the remainder by a line running along the section-lines from north to south, and that the proceeds of the said sales may be appropriated for the building of

[11] *ARCIA 1871*, 445-46.

houses, opening of farms, and other beneficial purposes as aforesaid.[12]

Congress responded with the Act of June 10, 1872, which authorized up to 50,000 acres "to be taken" from the western part of the Omaha reservation "and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south." The act used the phrase "the lands so separated" to refer to lands to be sold.[13]

The 1872 act also authorized the sale of land from the Pawnee, Otoe and Missouria, and Sac and Fox reservations. The act did not use the word "separated" to refer to the land being sold from these other reservations, and it did not refer to a line dividing the sale area from the "remaining" reservation land.[14] This language was unique to the Omaha portion of the act and came directly from the Omaha chiefs' petition. This suggests that the chosen words were significant and were understood both by the chiefs and by Congress. In a letter dated October 12, 1872, Commissioner of Indian Affairs F. A. Walker specified

---

[12] Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs* , S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 3, serial 1481.

[13] Act of June 10, 1872, 17 Stat. 391.

[14] Act of June 10, 1872, 17 Stat. 391.

the exact location of "the line of separation," using section lines.[15]

The 1872 act was intended to reduce the size of the Omaha Reservation. Commissioner Walker had expressed support for the legislation prior to its enactment, stating, "I believe that the general idea of diminishing these reservations for the purpose of securing a higher cultivation of the remaining lands, is consonant with sound policy. . . ."[16] (See below for a discussion of policy in this period.)

The land appraised and offered for sale pursuant to the 1872 act attracted only two purchasers. The terms of sale – perhaps the price per acre or the requirement of full payment upon receipt of a deed – may have deterred purchasers.[17] Furthermore, the area lacked convenient access to markets, as it was not served by rail lines at the time. (By the time

---

[15] F. A. Walker, Commissioner, to Elam Clark, October 12, 1872, 2, Special Case 46, Special Cases 1821-1907 [SC 46], Record Group 75: Records of the Bureau of Indian Affairs [RG 75], National Archives and Records Administration, Washington, D.C. [NARA I].

[16] Walker was referring to all of the reservations affected by the proposed legislation. Senate, *Letter from the Secretary of the Interior, Addressed to Hon. James Harlan, Chairman of the Committee on Indian Affairs* , S. misdoc. 41, 42d Cong., 2d sess., January 22, 1872, 2, serial 1481.

[17] House of Representatives, *Indians of the Northern Superintendency. Letter from Samuel M. Janney, on Behalf of Executive Committee of Friends, Relating to the Indians*, H. misdoc. 66, 43d Cong. 1st sess., January 12, 1874, 2, serial 1618; *ARCIA 1873*, 191.

Congress passed the 1882 act, a rail line had been built across the western part of the reservation, making this area much more attractive.)

The 1872 act was never fully implemented and, thus, did not actually change the boundary of the reservation. However, the Office of Indian Affairs regarded the reservation as having decreased in acreage as a result of the 1872 act.

Attempted Sale of Land to the Ponca Tribe

The Omahas continued to pursue a sale of land from the western part of the reservation after the passage of the 1872 act. The following year, the Omaha Tribe agreed to sell the Ponca Tribe a tract of land from its reservation. This attempted sale, which was not executed, reflected the Omahas' ongoing interest in generating revenue from a sale of their western lands

The general terms of the attempted sale were outlined in a resolution signed at a November 6, 1873, council of the Omaha and Ponca chiefs and headmen. The Omaha Tribe agreed to

> sell land to ~~members of~~ the [Ponca] tribe in allotments to members, in sufficient quantity

> for its wants at a fair price.[18] [Strikeout in original.]

The next passage reiterated this point:

> Resolved, that the Omaha Chiefs agree that they will sell sufficient land from their reservation in Nebraska to the Ponca tribe for its wants and at a fair price.[19]

The strikeout in the resolution is significant. Rather than a sale to individual Ponces (as Dr. Edmunds characterizes it), this was intended to be a sale to the Ponca Tribe. The mention of allotments does not suggest that the Poncas would receive scattered tracts of land interspersed with Omaha allotments. Instead, the language suggests that the number of allotments needed were a measure of what constituted a sufficient quantity of land for the Ponca Tribe's "wants."

The commissioner of Indian affairs reported on this agreement in his 1874 annual report. He referred to it as a "purchase of a sufficient tract of land from the Omahas," similarly interpreting it as a purchase of a block of land, rather than the sale of individual

---

[18] Minutes of a Meeting between the Omahas and Poncas, November 6, 1873, M 234, Roll 606, 663-64 [cited in footnote 48 of Dr. Edmunds' report].

[19] Minutes of a Meeting between the Omahas and Poncas, November 6, 1873, M 234, Roll 606, 663-64 [cited in footnote 48 of Dr. Edmunds' report].

allotments.[20] Historical geographer David Wishart's reading of this agreement is that "the plan was to settle the Ponca on the western part of the Omaha reservation, which had been surveyed and appraised for sale in 1872."[21]

Ultimately, the sale to the Ponca Tribe was not executed. However, the Omaha Tribe sold a tract of land "not exceeding twenty sections" to the United States in 1874, for addition to the Winnebago Reservation.[22] The Winnebago sale reflects the Omaha Tribe's ongoing interest in selling excess land for revenue, and it provided a model for separating a block of land from the reservation, similar to what the 1872 act had intended.

The push to sell the western lands did not end there. In his 1875 report, Agent T. T. Gillingham wrote,

> This reservation now comprises about 193,000 acres, including 50,000 acres offered for sale three years ago, but which failed to sell, and is now held in trust by the United States. I am decidedly of the opinion that much, if not most, of the opposition to the Indians felt among white settlers is in the fact that they hold large tracts of land lying

---

[20] *ARCIA 1874*, 47

[21] David J. Wishart, *An Unspeakable Sadness: The Dispossession of the Nebraska Indians* (Lincoln: University of Nebraska Press, 1994), 207.

[22] Act of June 22, 1874, 18 Stat. 146 at 170.

> idle and unproductive. I think it would be much better for all parties concerned if all this surplus land could be sold; and if the proceeds were not needed for the improvement of the tribe, let it be held as a trust-fund, drawing interest.[23]

Although Congress did not pursue the matter again until 1880, it does not appear that the Omahas utilized the western portion of the reservation in the intervening years.[24] This may reflect the Omahas' lack of interest in this land for anything other than its potential revenue. Although the railroad had been built by 1882, it does not appear to have triggered a movement of Indians to the area Alice Fletcher, who was later assigned to make allotments to the Omahas, had to urge Indians to take allotments around the railroad.

Congressional Intent and the 1882 Act

Like the Omaha Tribe, Congress continued to work toward a sale of land from the Omaha Reservation's western end. It considered bills in 1880 and 1881, but these efforts failed without much debate. Meanwhile, Alice Fletcher arrived on the reservation

---

[23] *ARCIA 1875*, 318.

[24] During the 1882 debates, Senator Alvin Saunders read a letter from the BIA agent at Omaha, who said there were no Indians living in the western section and the Indians had made no improvements in that area *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3029.

in 1881 and found the tribe concerned about removal and security of members' title to land. In early 1882, she helped 53 members of the tribe draft a petition requesting "clear and full title" to the lands they had improved.[25] Congress considered another land sale bill in February 1882, which it subsequently amended to include provisions addressing the Indians' request for titles by authorizing allotment in severalty of the reservation (see below).

The debates on one of the predecessor bills indicate that Congress considered the proposed legislation to be connected to the 1872 act. On June 4, 1880, the Senate discussed S. 1136, a bill "to provide for the sale of a portion of their reservation of the Omaha tribe of Indians." Senator Alvin Saunders of Nebraska clearly linked S. 1136 to the 1872 act. He explained,

> The bill provides for a survey and sale of fifty thousand acres. There was a bill passed some eight years ago authorizing the sale of this land, and only about three hundred acres of land were sold under it. The Secretary now recommends that we deduct that from this bill so that the survey may stand as it is, 49,461.71 acres instead of fifty thousand acres.[26]

---

[25] Senate, *Memorial of the Omaha Tribe of Indians, for a Grant of Land in Severalty*, S. misdoc. 31, 47th Cong., 1st sess., January 11, 1882, serial 1993.

[26] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4135.

Saunders similarly referred back to the 1872 act when defending the pending bill's provision to sell the Omaha land in a single tract:

> Let me state the reason for it. A bill was passed some seven or eight years ago authorizing it to be sold in smaller tracts, but people would not go and settle around the Indians when they could get lands as cheap or cheaper off a distance from them. The object now is that we may get, if possible, persons to emigrate in colonies and go and make their own settlements where they will not be isolated from society.[27]

He also connected the proposed legislation to the same purpose as the 1872 act had intended to serve. He said, "The Indians want the land sold. . . . [T]hey want this money put out at interest so that they can have the interest to use in improving their farms. They are very desirous to have the land sold. They even would have it sold at a lower figure than this bill names if it cannot be sold at that."[28]

The Senate proceeded to debate the issue of selling the land in a block and ultimately discussed recommitting S. 1136 to the Committee on Indian Affairs. Senator Francis Cockrell of Missouri then said,

---

[27] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4135.

[28] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4135.

> . . I now desire to call the attention of the committee, when this bill shall be recommitted, to the law of June 10, 1872. There is an act for the relief of certain tribes of Indians in the northern superintendency; that act is in full force, and why this exceptional legislation? That act has not ceased to exist. The Secretary of the Interior recommends that this bill shall be made to conform to that at which is now a law.[29]

The bill was then recommitted to the committee.[30] It does not appear to have been further considered by Congress. Two subsequent bills also failed to progress.

The bill that became the Act of August 7, 1882, was introduced in the Senate on February 20 of that year.[31] The first floor debate took place on April 19. Senator Saunders remarked, "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed. The Indians want it passed so as to put the money derived from the sale

---

[29] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4136.

[30] *Congressional Record*, 46th Cong., 2d sess., June 4, 1880, 10: 4137.

[31] *Congressional Record*, 47th Cong., 1st sess., February 20, 1882, 13: 1282.

on interest. The white people are there ready to buy the land and put it in cultivation."[32]

Senator William Allison of Iowa recommended that, if any part of the land to be sold were already occupied by Indians, "we should except and reserve so much of said lands as are so occupied."[33] Senator Saunders asked that a letter from the Indian agent to the commissioner of Indian affairs be read, which stated, "there are no Indians living on the western portion of the Omaha reservation; that no land has been allotted to any of them so far as I can ascertain; and furthermore, that there are no improvements, such as housing, fencing, &c., upon the 50,000 acres of land alluded to in your letter."[34]

Senator Henry Dawes of Massachusetts thought some protection was needed in case these assertions were incorrect and that an Indian did have land in the sale area. If so, he should have a patent exempting his lands from taxation.[35] Dawes proposed an amendment stipulating that "any right in severalty

---

[32] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3027

[33] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3029.

[34] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3029.

[35] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3031.

acquired by any Indian under existing treaties shall not be affected by this act."[36]

In response to a question from Senator Omar Conger of Michigan, Dawes explained that Indians would not have the right to take land in severalty from the sale area after the sale. Conger then said he opposed the effort to take away the best Indian land by legislation and force them to take allotments on land less suited for agriculture. But he himself said,

> They want to be near the river; in their ignorant condition as to farming and agriculture, they want to be where they can throw their lines into the muddy river and draw out the catfish. That is all they live upon, I am told. They will not select the land best adapted for agricultural purposes first; but intelligent men would select this beautiful Garden of Eden which is to be given to the white people from the part of the reservation now proposed to be sold.[37]

Saunders then challenged Conger's assertion that the Indians were only fishing and that they could not have successful farms elsewhere on the reservation,

---

[36] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3032.

[37] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3032.

saying that he had visited them and found several productive farms.[38]

Both Saunders and Dawes believed that the Omaha Tribe was eager to dispose of the land. Dawes stated,

> Last summer I saw the representatives of this tribe, and I heard them myself state that, while they were unwilling to take upon their ground any other Indians, they were very anxious to sell a portion of their real estate and obtain the money, so that the interest of the money they could use for the improvement of the residue of their property. They had more land than they could occupy, as I heard them state myself.[39]

Saunders similarly stated, "Twice they [the Omahas] have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold."[40] The Senate then passed the bill.

The House of Representatives amended the bill by substituting its own version, and it appears that a

---

[38] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 3032.

[39] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3032.

[40] *Congressional Record*, 47th Cong., 1st sess., April 20, 1882, 13: 3079.

provision authorizing allotments to the Omahas was added at that time.[41] The members of the House debated whether the Indians should be allowed to take allotments in the sale area and whether they would even want allotments in that part of the reservation.[42] Representative William Holman of Indiana wanted the act to say that all allotments would be made prior to the sale of the land. Representative Edward Valentine of Nebraska said that doing that "will defeat the very desire of the Indians themselves, because the children, the younger members of the tribe, will not be able to make their selections for a great many years." The debate continued about whether or not there should be a requirement for allotments to be completed before the sale.[43] The resulting legislation did not specify an order of events.[44]

Like their counterparts in the Senate, members of the House believed that the Omahas wanted to sell their land. Valentine said, "These Indians I know very well, and they are anxious to sell this

---

[41] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6383-84. The earlier Senate debates on S. 1255 refer to the allotment provision under the 1865 treaty; there was no indication that the original version of S. 1255 contained a new allotment provision.

[42] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6539-40.

[43] *Congressional Record*, 47th Cong., 1st sess., July 27, 1882, 13: 6571.

[44] Act of August 7, 1882, 22 Stat. 341.

portion of the reserve and have allotments made to them in severalty of the remainder. It is at their request, as I have stated, that the bill was drawn. . . ."[45] In response to the suggestion that the Indians should sell the eastern part of the reservation and keep the better lands in the west, Representative Alfred Scales of North Carolina said he would be okay with selling the eastern part of the reservation. Valentine replied,

> I have no doubt the gentleman would consent; but it is not his consent we are asking. It is the consent of the Indians that we desire; and the Indians wish to retain the eastern part. You cannot find a single Indian of that tribe who will consent to the sale of the eastern part of the reservation. A delegation from the tribe, headed by Joe Laflesche, so stated before the committee. You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold.[46]

Representative Valentine clearly linked the proposed bill with the 1872 act on July 26:

---

[45] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6539.

[46] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6541.

> I desire to say there is now a law authorizing the Secretary of the Interior to sell 50,000 acres of that land. It embraces all the land mentioned in this bill and some other land in addition; and that land may be sold indiscriminately to any persons. It may be sold to persons not expecting to become actual settlers.
>
> After this railroad was built through there the Indians then asked that he sell no land under the law as it now exists, and made their petitions for a bill of this character, the one which is now pending before the House, and which was framed in accordance with their wishes.[47]

The Indians' request to prevent sale under the 1872 act may have been due to the likely effect the arrival of the railroad would have had on the value of land. The 1872 act set the minimum sale price of $1.25 per acre, although it also specified that "average sales of each of said parcels of said land shall be at least two dollars and fifty cents per acre."[48] S. 1255 and the resulting 1882 act set the minimum price at $2.50 per acre.[49] The arrival of the railroad also changed

---

[47] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6539.

[48] The latter provision may have been one of the challenges to selling the land under the 1872 act. Act of June 10, 1872, 17 Stat. 391.

[49] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3032; Act of August 7, 1882, 22 Stat. 341.

circumstances by providing a more convenient dividing line between the sale area and the land remaining in the reservation, affording both settlers and Indians access to land along the railroad.

Dr. Edmunds makes a number of unfounded assertions about the intentions of members of Congress (particularly Saunders[50]) and about the role Commissioner of Indian Affairs Hiram Price may have played in the debates. The most egregious statements are in the following passage, dealing with the conference committee that was called when the Senate rejected the House's substitute bill:

> Whether Saunders was informed of Price's intentions while the Joint Committee of the Senate and House met to discuss this Act in the three days between July 29 and August 3, 1882 remains unknown, but something happened which evidently reassured Saunders that significant numbers of individual Omahas would either be discouraged from selecting allotments west of the railroad, or forbidden from purchasing lands in that region, for Saunders completely reversed his earlier opposition to the amended bill, and the Land Act of 1882 (as amended) passed

---

[50] Edmunds suggests that Saunders blocked passage of the House's substitute bill because it would allow Indians to select land west of the railroad. But it appears that Saunders urged the Senate to send the bill to conference committee purely on principle. He said he had not read the amendment. *Congressional Record*, 47th Cong., 1st sess., July 29, 1882, 13: 6628.

> both houses of Congress. Evidence strongly suggests that either Price, or someone speaking on Price's behalf (Haskell?) assured Saunders that regardless of Congress's intent, the Indian Department would use all their influence to prevent the Omahas from selecting allotments or purchasing lands west of the railroad.[51]

Edmunds provides no evidence that Saunders, Price, and Haskell had any form of interaction during the debates.[52] In addition, there is no evidence that Saunders opposed allowing the Indians to select or purchase lands west of the railroad. Although he did say "I do not think an acre of this land will be sold to the Indians," the remark appears to reflect Saunders' belief that the Indians were not interested in the western land.[53] Finally, Price did not address the issue of whether Indians could purchase the western lands until February 1884.[54] There is no evidence that

---

[51] Edmunds, "'The Best Farming Land in That Region,'" 64.

[52] A letter from Price to Saunders appears in the *Congressional Record*, but it is dated December 15, 1881, before the debates began. *Congressional Record*, 47th Cong., 1st sess., April 20, 1882, 13: 3079.

[53] *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3029. Saunders referred to the land as "not occupied by the Indians." *Congressional Record*, 47th Cong., 1st sess., April 19, 1882, 13: 3031.

[54] Hiram Price, Commissioner, to Alice Fletcher, February 21, 1884, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558: Alice Fletcher Papers, Papers of Alice Fletcher and Francis La Flesche [MS 4558], National Anthropological Archives, Suitland, Maryland [NAA].

he considered the matter during the course of the congressional debates.

Edmunds asserts that Saunders and Haskell "had both conferred closely with Commissioner of Indian Affairs Hiram Price in designing the initial bill. . ."[55] He provides no evidence of this. Haskell stated that he was involved in writing the provision regarding sale of land to bona fide settlers, but that is the only information I have found in the *Congressional Record* about the authorship of the bill, and that appears to apply to the House substitute rather than the original bill.[56] Further, Edmunds says of Price, "as Commissioner of Indian Affairs, he assisted Haskell in composing the original draft of the bill, and his efforts had focused on the allotment provisions." Edmunds cites pages 3027, 6538, and 6540 of the *Congressional Record*, volume 13, in support of this statement.[57] There are several problems with this statement. First, the pages Edmunds cites do not shed any light on whether Price participated in drafting the legislation. They contain some references to the involvement of the committees on Indian affairs (the Senate and House each had one), and there is a reference to the commissioner in passing on page 6540 that is not connected to the drafting of the bill. Second, the allotment provision in the 1882 act

---

[55] Edmunds, "'The Best Farming Land in That Region,'" 60.

[56] *Congressional Record*, 47th Cong., 1st sess., July 26, 1882, 13: 6538.

[57] Edmunds, "'The Best Farming Land in That Region,'" 63.

does not appear to have been in the original draft of the bill; it was added when the House amended S. 1255 in the form of a substitute bill (see above). Finally, Haskell, a member of the House, probably was not involved in drafting the original bill, which had been introduced by the Senate. As noted above, Haskell did participate in the drafting of the House substitute. In sum, there is no evidence to support Edmunds' assertions of collusion in the drafting of or the passage of the 1882 act.

Federal Policy in 1882

Congress's passage of the 1882 act took place in the context of an emerging Indian assimilation policy. Two key tenets of the assimilation policy are evident in the act: (1) Indians should become "civilized," i.e., culturally and economically more like Euroamericans. Policy makers sought to achieve this through imposition of private property on Indians and by training them to be farmers. (2) As farmers, Indians would need less land, and the "surplus" should be opened to development by non-Indians.

Congress had ended the practice of treaty-making in 1871, providing that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty. . . ."[58] Francis A. Walker,

[58] Act of March 3, 1871, 16 Stat. 544 at 566.

commissioner of Indian Affairs from 1871 to 1873, considered the implications of this change in an 1873 article titled "The Indian Question." The question, Walker said, "naturally divides itself into two: What shall be done with the Indian as an obstacle to the national progress? What shall be done with him when, and so far as, he ceases to oppose or obstruct the extension of railways and settlements?"[59] Walker argued Indians should be separated and secluded on reservations,

> and should, in any reductions [to their reservations] thereafter requiring to be made, provide that such reductions shall be by cutting off distinct portions from the outside, and not in such a way as to allow veins of white settlement to be injected, no matter whether along a stream or along a railway.[60]

After reciting statistics on the number of Indians and the square mileage of Indian reservations, he continued:

> It must be evident to every one, on the simple statement of such facts as these, that the reservations, as at present constituted, do not consist with the permanent interests of either the Indian or the government. There are too many reservations; they occupy too much territory in the aggregate; and, what is

---

[59] F. A. Walker, "The Indian Question," *The North American Review* 116, no. 239 (April 1873): 337.

[60] Walker, "The Indian Question," 365.

> worse, some of them unnecessarily obstruct the natural access of population to portions of territory not reserved, while others, by their neighborhood, render large tracts of otherwise available land undesirable for white occupation.[61]

This is the policy framework within which Walker supported diminishment of the Omaha Reservation in early 1872 (see above). At the end of that year, Walker commented that Indian reservations were designed to support a hunting and fishing lifeway. "As they change to agriculture, however rude and primitive at first," he wrote,

> they tend to contract the limits of actual occupation. With proper administrative management the portions thus rendered available for cession or sale can be so thrown together as in no way to impair the integrity of the reservation. Where this change has taken place, there can be no question of the expediency of such sale or cession.[62]

The Omahas' request to sell land from the western end of the reservation, bounded by a "line of separation" from the remainder, fit nicely with Walker's perspective on reservations.

In the wake of several brutal attempts to remove Indians from their homelands during the late 1870s,

---

[61] Walker, "The Indian Question," 366.

[62] *ARCIA 1872*, 13.

a humanitarian reform movement emphasizing Indian assimilation gained strength. The reformers believed that the best hope for Indians was to Christianize them and teach them agriculture and other Euroamerican economic pursuits, so they could assimilate into the American mainstream. Policy historian Francis Paul Prucha summarized the reformers' attitude about reservations as follows:

> When the new Christian reformers came on the scene about 1880, the reservation system was firmly established and had become the foundation of United States Indian policy. The reformers at first accepted the reservations and worked within the system, seeking to protect the land rights of the Indians, although they did not hesitate to promote the reduction of reservations in order to speed the Indians' acceptance of an individualized agricultural existence. They supported reservations, too, as protected enclaves in which the programs of civilization and Americanization could move forward. Yet in the end the reservations became an abomination, for they symbolized the great separation between the Indians and the rest of American society, a separation that precluded the absolute Americanization that was the ultimate

> goal of the reform organizations and their friends in government.[63]

During this time, policy makers abandoned the idea of trying to consolidate Indians on a few large reservations. According to Prucha, however, "reduction of the existing reservations continued to be strongly pushed."[64] Secretary of the Interior Henry Teller promoted such a policy during his tenure. In 1882, Teller wrote,

> These reservations ought to be sufficient for the support of the Indians who reside on them, with a reasonable allowance for increase of the Indian population, but they should not be disproportionate to the wants of Indians. Very many of these reservations contain large areas of valuable land that cannot be cultivated by the Indians, even though they were as energetic and laborious as the best class of white agriculturalists. All such reservations ought to be reduced in size and the surplus not needed ought to be bought by the government and opened to the operation of the homestead law, and it would then soon be settled by industrious whites, who, as neighbors, would become valuable auxiliaries in the work of civilizing

---

[63] Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, 2 vols. (Lincoln: University of Nebraska Press, 1984), II: 631.

[64] Prucha, *The Great Father*, I: 580.

> the Indians residing on the remainder of the reservation.[65]

The members of Congress, particularly those on the Indian affairs committees in the House and Senate, would have been conversant with the policies of the period, particularly those promoted by the secretary of the interior. Although they did not use explicit words like "reduce" or "diminish" to refer to the Omaha land sale's effect on the reservation, they very likely understood the 1882 act to have that meaning.

Omaha Land Preferences

Allotment patterns on the Omaha Reservation both before and after the 1882 act demonstrate that the Omahas preferred lands in the eastern and southern portions of their 1865 reservation.

Mark Awakuni-Swetland examined this phenomenon in a 1994 study of Omaha allotments. The first allotments, made in 1871 under the terms of the 1865 treaty, clustered in the eastern half of the reservation. None were west of Logan Creek (which Awakuni-Swetland depicted as the post-1882 western boundary of the reservation in all of his maps); in

---

[65] *Report of the Secretary of the Interior*, H.exdoc. 1, Part 5, vol. 1, 47th Cong., 2d sess., 1882, vii, serial 2099. See also Prucha, *The Great Father*, I: 580-81.

fact, only a handful were in Range 8 East, and none fell west of that.[66]

In 1883, Alice Fletcher began making allotments under the 1882 act. She urged the Omahas to select land in the Logan Creek valley, near the railroad right of way. She considered this the best agricultural land, and it afforded rail access to markets.[67] While some of the Omahas accepted her advice, others preferred the eastern part of the reservation for its access to water and timber.[68] Awakuni-Swetland also found that some elders "recounted the dislike for choosing western parcels of land due to the abundance of snakes encountered on the prairies."[69]

As a result of the Omahas' preferences, more of the allotments made after the 1882 act were in the eastern half of the reservation than in the western half, although a number were along Logan Creek. The Omahas also displayed a preference for the southern half of the reservation. Notably, only a small number of Omahas selected allotments west of the railroad, and these were just barely west of it. No

---

[66] Mark Awakuni-Swetland, "'Make-Believe White Men' and the Omaha Land Allotments of 1871-1900," *Great Plains Research Journal* 4 (August 1994): 211 (map).

[67] Awakuni-Swetland, "Make-Believe White Men," 215; Joan Mark, *A Stranger in Her Native Land: Alice Fletcher and the American Indians* (Lincoln: University of Nebraska Press, 1988), 89.

[68] Awakuni-Swetland, "Make-Believe White Men," 215.

[69] Awakuni-Swetland, "Make-Believe White Men," 217.

Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands.[70]

The Omahas were given another opportunity to select allotments in 1900, pursuant to the Act of March 3, 1893. The allotments took up most of the open space in the reservation. None were made west of Logan Creek, which suggests that the BIA and the tribe considered this to be the western boundary of the reservation.[71]

In contrast to Dr. Edmunds' depiction of the Omahas as ignorant victims who were deprived of the more fertile western lands, Omaha Indians preferred the eastern lands and made their allotment choices accordingly. Although Fletcher persuaded a number of them to take allotments in the Logan Creek valley, very few of them chose land west of it. And even those selections were close to the creek and railroad, suggesting that the Omahas regarded those features as marking the edge of their reservation.

Allotments West of the Railroad

Dr. Edmunds argues that Commissioner of Indian Affairs Hiram Price "exerted considerable pressure upon [Alice] Fletcher to use her influence to

---

[70] Awakuni-Swetland, "Make-Believe White Men," 217 (map).

[71] Awakuni-Swetland, "Make-Believe White Men," 229 (map).

keep the Omahas from selecting allotments west of the railroad."[72] There is no evidence of this. Edmunds draws this conclusion in large part because Price urged that allotments west of the railroad be made quickly. Price explained why in his 1882 annual report:

> . . . it was suggested that steps might be taken to obtain the consent of the Indians, as required in sections 1 and 5 of said act, and that the allotments provided for in section 5 might be selected and submitted for approval, so that no unnecessary delay might be experienced when the proper time should arrive for proceeding with the sale of the lands as authorized. By section 8 of the act the Indians are permitted, if they shall so elect, to select allotments within the tract designated to be sold, and while it is not thought that there are any who desire to make selections there, it might be well to ascertain their intentions in that respect, so that if there be any such they may make their selections and have them approved before the appraisement is begun.[73]

This passage indicates that Price was trying to figure out a proper sequence of events to avoid delays in implementing the 1882 act. As noted above, the act itself did not provide guidance on the timing of allotments and opening the western lands for sale.

---

[72] Edmunds, "'The Best Farming Land in That Region,'" 61.

[73] *ARCIA 1882*, lxvii.

Price's annual report was dated October 10, 1882, so he was thinking about these matters well before he gave Alice Fletcher instructions regarding the allotments west of the railroad, which occurred in April 1883.[74] Price said that, as one of her first duties, Fletcher should determine whether any tribal members wanted allotments west of the railroad right of way, so that the appraisal of land to be sold could move forward.[75] Price wrote,

> You will please ascertain whether any of the Indians desire to make their selections *west* of the right-of-way of the Sioux City and Nebraska Railroad Company. It is important that their wishes in that respect be made known at once in order that the appraisement of the lands lying west of the railroad may be proceeded with, if deemed desirable, without waiting for the completion of the allotments. . . .
>
> You will make this one of your first duties, and inform this office as soon as you have ascertained the intention of the Indians in respect of the matter.[76] [Emphasis in original.]

---

[74] *ARCIA 1882*, iii.

[75] Hiram Price to Alice Fletcher, April 21, 1883, 6-7, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA.

[76] H. Price, Commissioner, to A. C. Fletcher, April 21, 1883, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA.

Price simply wanted the allotments west of the railroad to be made quickly, so the land sale could proceed. He did not seek to subvert Congress's intentions – in fact, he adhered to those intentions by ensuring that Indians made any selections west of the railroad first, before the land was opened for sale.

Price reiterated the urgency of this matter in a letter to Fletcher on May 7, 1883.[77] Fletcher replied to Price's instruction that she would "ascertain as speedily as possible who among the Omahas desire claims west of the Railroad right of way."[78] Although the historical record does not reflect what the Omahas thought about the pressure to make these selections quickly, they likely would not have wanted to delay the appraisal and sale of the land, as they were eager for the proceeds. Price did not exert pressure on Fletcher to keep Indians out of the area west of the railroad. Furthermore, Fletcher's later activities indicate that she would not have been inclined to discourage them from doing so. Indeed, she used her "influence" to encourage Omahas to select allotments in the Logan Creek valley.[79]

---

[77] Hiram Price to Alice Fletcher, May 7, 1883, 2, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA.

[78] A. C. Fletcher to H. Price, Commissioner of Indian Affairs, May 14, 1883, Letter No. 1883.9203, Box 50, SC 46, RG 75, NARA I.

[79] Mark, *A Stranger in Her Native Land*, 89.

Dr. Edmunds seems to misunderstand Price's comment about speculators in his May 7, 1883, letter. Price wrote,

> It is not unlikely that influences will be brought to bear upon some of the Omahas to have them select their allotments west of the Railroad right of way, in order that tracts of extra value may be withheld from sale, and finally get into the hands of speculators.[80]

Edmunds asserts that Price "gave no rationale why Omaha allotments west of the right of way would be more vulnerable than those to the east of the railroad. . . ."[81] It is my opinion that Price saw a difference between lands east and west of the railroad. Those east of the railroad would remain part of the reservation, and no provision had been made to open up land within the reservation for sale. If an allottee decided to give up an allotment east of the railroad for one elsewhere, it wouldn't fall into the hands of a non-Indian. West of the railroad, circumstances were different. Price prohibited anyone who selected an allotment west of the railroad from exchanging it for another allotment, because such relinquished allotments would be available for sale. Thus, it would be possible for allottees, who had first choice of the lands west of the railroad, to take up "tracts of extra value" west of the right of way and

---

[80] H. Price to A. C. Fletcher, May 7, 1883, 1, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4558, NAA.

[81] Edmunds, "'The Best Farming Land in That Region,'" 62.

hold onto them for a non-Indian. Price's prohibition prevented this from happening.

Dr. Edmunds argues that Price "dismantled" congressional intent by preventing Omahas from purchasing land west of the right of way.[82] It is true that Price determined Omahas could not purchase the lands because they were not citizens, and it is also true that members of Congress discussed allowing the Indians to purchase lands west of the railroad. But the 1882 act clearly stated that only citizens could purchase the land, and Omahas were not regarded as citizens at that time. Additionally, the 1882 act *did not* contain a provision allowing the Indians to purchase land west of the railroad, indicating that it was not Congress's explicit intent to do so. Dr. Edmunds insinuates that Price had something to do with the absence of a provision allowing Omahas to purchase the lands, but he has absolutely no evidence on that point.[83] Price himself said that his position on Indian purchases came from a reading of the act's language.[84]

---

[82] Edmunds, "'The Best Farming Land in That Region,'" 63.

[83] Edmunds, "'The Best Farming Land in That Region,'" 63.

[84] H. Price, Commissioner, to A. C. Fletcher, February 21, 1884, Box 3, MS 4558, NAA. Fletcher later noted that the Omahas became citizens upon passage of the General Allotment Act of 1887. Alice C. Fletcher to J. E. Rhoads, April 7, 1887, 2, Box 2, Series 2: Outgoing Correspondence, MS 4558, NAA.

Boundary Location

I did not find any evidence in the historical record of disputes over the location of the western boundary. Despite the references Dr. Edmunds has found to 1882 sale lands as being "on" or "in" the reservation, the BIA understood the lands west of the right of way to be outside the reservation. As noted above, the BIA did not count the 50,000-acre sale area as part of the reservation in its annual statistics. A number of statements from BIA agents reflect that, administratively, the lands were considered outside the reservation.

- 1882: The commissioner of Indian affairs responded to the Senate Committee on Indian Affairs with information about what the size of the reservation would be after the sale. He wrote, "In reply to the inquiry of the committee as to whether, if so much of the reservation is sold as provided, the remainder will be adequate for the present and prospective wants of the Indians located thereon, I will state that there will be remaining an area of 143,225 acres, more than will be required for present or future wants."[85]

---

[85] The commissioner's letter was dated March 20, 1882, and was excerpted in a House report related to S. 1255. *Sale of a Part of Omaha Indian Reservation in Nebraska*, H.rpt. 1530, 47th Cong., 1st sess., July 1, 1882, 2, serial 2069.

- 1885: Agent George Wilkinson spoke of the reservation as having been "reduced" as a result of the sale.[86]

- 1890: Agent Robert Ashley wrote of the Winnebago and Omaha reservations collectively, "This reservation is located on the eastern boundary, and embraces the entire county of Thurston, Nebr., except a portion of the reservation which has been sold and is now occupied by the white purchasers."[87] [I interpret this statement to mean that the portion of Thurston County in the sale area was *not* part of the reservation.]

- 1897: Acting Agent W. A. Mercer used similar language to Ashley: "The Omaha and Winnebago reservations are located in the northeastern part of Nebraska and embrace all of Thurston County, except a portion of the reservation which has been sold and is now occupied by the white purchasers."[88]

- 1901: Agent Charles Mathewson reported, "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and forms the southwestern boundary of the Omaha Reservation."[89]

---

[86] *ARCIA 1885*,135.

[87] *ARCIA 1890*, 136. Ashley made a similar statement in his 1892 report. *ARCIA 1892*, 304.

[88] *ARCIA 1897*, 178.

[89] *ARCIA 1901*, 269.

- 1903: Mathewson used slightly different language, stating, "The Omaha and Winnebago reservations are located in northeastern Nebraska, and comprise the larger portion of Thurston County, excepting about 20,000 acres, and several sections in each of the counties of Burt, Cuming, and Dixon, making a total area of 250,000 acres."[90] [I interpret this statement to mean that the portion of Thurston County west of the railroad was *not* part of the reservation.]

- 1904: The superintendent in charge of the Omaha Agency reported, "This agency is located on the east side of the Omaha Reservation about 3 miles from the Missouri River, which forms the eastern boundary, and 20 miles from the western boundary line, which is marked by a section of the Northwestern Railway line extending between Omaha and Sioux City."[91]

The commissioner's annual reports contain reports from reservation agents until 1906. In only one report between 1882 and 1906 – that for 1905 – did an agent make a statement that overtly ran counter to the BIA's understanding of the reservation having been diminished in 1882. In 1905, Superintendent John Mackey described the Omaha Reservation as "embracing about 200,000 acres," which would

---

[90] *ARCIA 1903*, 201.

[91] *ARCIA 1904*, 235.

seem to include the acreage in the sale area.[92] A table in that year's report conflicted with Mackey's statement, indicating that the reservation contained 129,470 allotted acres and 12,421 unallotted acres, for a total of 141,891 acres.[93] Other years not mentioned in the list above either did not explicitly address the boundary or reported acreages that are consistent with the reservation having been diminished by the 1882 sale.

Although no disputes arose over the boundary location, two tribal delegates did inquire into the 1882 land sales in 1924. They asked various questions about the amount of land sold, its value, the amount of interest due, and whether the tribe had been paid for the value of land and interest.[94] The delegates did not say anything about ownership of the land, however. Their primary concern appeared to be with accounting for the money due to the tribe.

There is no evidence that the Omaha Tribe or its members anticipated being able to use the lands west of the railroad after the 1882 act. Congress does not appear to have intended the Omahas to use the land, as there is nothing in the 1882 act reserving any rights to the tribe. Furthermore, Congress

---

[92] *ARCIA 1905*, 248.

[93] *ARCIA 1905*, 496.

[94] Elwood Harlan and Edward Cline to Commissioner of Indian Affairs, January 31, 1924, File: 8269-1924-Omaha-313, Box 95, Central Classified Files 1907-1939, RG 75, NARA I.

subsequently decided that if the purchaser of a tract defaulted, that tract would be forfeited and reoffered for sale by the United States. The land did not revert to the tribe.[95]

Until very recently, the tribe had not raised questions about the boundary location. I did not find any historical records to suggest that the tribe ever sought to assert jurisdiction over the town of Pender prior to the current dispute. Similarly, Dr. Edmunds offered no historical evidence of disputes about the boundary location.

Summary

The historical evidence indicates that the Omaha Tribe had little interest in the land at the western end of the reservation, except to sell it and generate revenue. The tribe made multiple attempts to sell the land beginning in 1871 and culminating in the successful implementation of the Act of August 7, 1882. They did not settle on or improve the western part of the reservation prior to the 1882 act, and a very small number of Indians subsequently took allotments west of the railroad, despite the urging of allotting agent Alice Fletcher. The Omahas' lack of interest in the western lands reflected their cultural and economic perspectives, which differed from those of Euro-american settlers.

---

[95] Act of May 5, 1888, 25 Stat. 150 at 151.

The Act of June 10, 1872, set the stage for the 1882 act. Although the 1872 act was not fully executed, the BIA understood it to have diminished the acreage in the Omaha Reservation. Members of Congress clearly linked the 1872 act to subsequent legislative attempts to sell the western land. Representative Valentine reported that, following completion of the railroad, the Omahas called for land sales under the 1872 act to be suspended. The 1882 act superseded the 1872 act but adhered to the earlier act's intention of diminishing the reservation by 50,000 acres.

The tribe's interest in selling the land dovetailed with policy goals of the period. During the 1870s, that policy was to remove Indians from their homelands and to consolidate them on large reservations, out of the way of Euroamerican settlement. When that strategy failed, policy makers focused on reducing Indians' landholdings and turning them into farmers. The assimilation policy that emerged in the early 1880s aimed to impose Euroamerican cultural and economic norms on Indians. A key strategy of the assimilation policy was to allot reservations in severalty and then open up the "surplus" land to be developed by non-Indians. The 1882 act was an important precursor of the 1887 General Allotment Act (Dawes Act), which applied that strategy broadly and had been contemplated by Congress since 1879. Although members of Congress did not use explicit terms associated with diminishment in the debates or the

1882 act itself, they operated in a policy context were reduction of Indian reservations was a key goal.

Starting in 1874, the BIA's reported acreage of the Omaha Reservation excluded the 50,000 acres affected by the 1872 and 1882 acts. The BIA consistently treated the reservation as having been diminished in size by those acts. Despite references to lands west of the railroad being "on" or "in" the reservation, the BIA understood the western boundary to have moved to the railroad right of way.

For these reasons, I affirm my opinion that the Act of August 7, 1882, had the effect of reducing the Omaha Reservation and changing its western boundary.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

ANNUAL REPORT

OF THE

COMMISSIONER OF INDIAN AFFAIRS

TO THE

SECRETARY OF THE INTERIOR

FOR

THE YEAR 1884.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1884.

* * *

[260] *Schedule showing the names of Indian reservations in the United States, agencies, tribes occupying or belonging to the reservation, &c.* – Continued. [261]

Name of reservation.	Agency.	Name of tribe occupying reservation.	Area in acres.	Square miles.[a]	Date of treaty, law, or other authority establishing reserve.
KANSAS.					
Black Bob	Pottawatomie and Great Nemaha.	Black Bob's band of Shawnees, Pottowatomi	*e*4,349	6½	Treaty of May 10, 1854, vol. 10, p. 1053; joint resolution March 30, 1879, vol. 20, p. 488.
Chippewa and Munsee	do	Chippewa and Munsi	*e*4,395	6½	Treaty of July 16, 1859, vol. 12, p. 1105.
Kickapoo	do	Kickapoo	*e*20,273	32	Treaty of June 28, 1862, vol. 13, p. 623.
Pottawatomie	do	Prairie band of Pottawatomi	*e*77,358	121	Treaties of June 5, 1846, vol. 9, p. 853; of November 15, 1861, vol. 12, p. 1191; treaty of relinquishment. February 27, 1867, vol. 15, p. 531.
Total			106,375	166	
MICHIGAN.					
Isabella	Mackinac	Chippewas of Saginaw, Swan Creek, and Black River,	*e*11,097	17¼	Executive order, May 14, 1855; treaties of August 2, 1855, vol. 11, p. 633, and of October 18, 1864, vol. 14, p. 657
L'Anse	do	L'Anse and Vieux de Sert bands of Chippewas of Lake Superior.	*e*52,684	82¼	Treaty of September 30, 1854, vol. 10, p. 1109.
Ontonagon	do	Ontonagon band of Chippewas of Lake Superior.	*e*2,551	4	Sixth clause, second article, treaty of September 30, 1854, vol. 10, p. 1109; Executive order, September 25, 1855.
Total			66,332	103⅓	
MINNESOTA.					
Boise Fort	La Pointe(*k*)	Bois Fort Band of Chippewas	*d*107, 509	168	Treaty of April 7, 1866, vol. 14, p. 765.
Deer Creek	do	do	23,040	36	Executive order, Jane 30, 1883.
Pond du Lac	do	Fond du Lac band of Chippewas of Lake Superior.	*e*100,121	156	Treaty of September 30, 1854, vol. 10, p. 1109; act of Congress approved May 29, 1872, vol. 17, p. 190.
Grand Portage (Pigeon River).	do	Grand Portage band of Chippewas of Lake Superior.	*d*51, 840	81	Treaty of September 30, 1854, vol. 10, p. 1109.
Leech Lake	White Earth (consolidated).	Pillager and Lake Winnebagoshish bands of Chippewas.	*f*94, 440	148	Treaty of February 22, 1855, vol. 10, p. 1165; Executive orders, November 4, 1873, and May 26, 1874.
Mille Lac	do	Mille Lac and Snake River bands of Chippewas.	*e*61, 014	95	Treaties of February 22, 1855, vol. 10, p. 1165, and article 12, of May 7, 1864, vol. 13, pp. 693, 695.

Red Lake	do	Red Lake and Pembina bands of Chippewas	d3,200,000	5,000	Treaty of October 2, 1863, vol. 13, p. 667
Vermillion Lake	La Pointe(k)	Bois Fort band of Chippewas	e1,080	2	Executive order, December 20, 1881.
White Earth	White Earth (consolidated).	Chippewas of the Mississippi, Gull Lake, Pembina, Otter Tail, and Pillager Chippewas.	e796, 672	1,245	Treaty of March 19, 1867, vol. 16, p. 719; Executive orders, March 19, 1879, and July 13, 1883.
Winnebagoshish (White Oak Point).	do	Lake Winuebagoshisia and Pillager bands of Chippewas, and White Oak Point band of Mississippi Chippewas.	f320, 000	500	Treaties of February 22, 1855, vol. 10, p. 1165, and of March 19, 1867, vol. 16, p. 719; Executive orders, October 29, 1873, and May 26, 1874.
Total			4,755,716	7,431	
MONTANA TERRITORY.					
Blackfeet	Blackfeet	Blackfeet, Blood, and Piegan	21,651,200	33,830	Treaty of October 17, 1855, vol. 11, p. 657; unratified treaties of July 18, 1866, and of July 13 and 15, and September 1, 1868; Executive orders, July 5,1873, and August 19, 1874; act of Congress approved April 15, 1874, vol. 18, p. 28; Executive orders, April 13, 1875, and July 13, 1880.
Do	Fort Peck	Assinaboine, Brulé, Santee, Teton, Unkpapa, and Vanktonai Sioux.			
Do	Fort Belknap	Gros Ventre, Asainaboine, and River Crow			
Crow	Crow	Mountain and River Crow	4,713,000	7,364	Treaty of May 7, 1868, vol. 15, p. 649 ; agreement made June 12, 1880, and approved by Congress April 11, 1882, vol. 22, p. 42; and agreement made August 22, 1881, approved by Congress July 10, 1882, vol. 22, p. 157
Jocko	Flathead	Flathead, Kutenay, and Pend d'Oreille	1,433,600	2,240	Treaty of July 16, 1855, vol. 12, p. 975.
Total			27,797,800	43,434	
NEBRASKA.					
Iowa (l)	Pottawatomie and Great Nemaha.	Iowa	dg16,000	25	Treaties of May 17, 1854, vol. 10, p. 1069, and of March 6, 1861, vol. 12, p. 1171.
Niobrara	Santee	Santee Sioux	e115,076	180	Act of Congress approved March 3, 1863, vol. 12, p. 819; 4th paragraph, art, 6, treaty of April 29, 1868, vol. 15, p. 637; Executive orders, February 27, July 20, 1866, November 16, 1867, August 31, 1869, and December 31, 1873.
Omaha	Omaha and Winnebago.	Omaha	e142,345	222½	Treaty of March 16, 1854, vol. 10, p. 1043; selections by Indians with President's approval, May 11, 1855; treaty of March 6, 1865, vol. 14, p. 667; acts of Congress approved June 10, 1872, vol. 17, p. 391, and of June 22, 1874, vol. 18,

					p. 170; deed to Winnebago Indians, dated July 31, 1874, and act of Congress approved August 7, 1882, vol. 22, p. 341.
Sac and Fox (*l*)	Pottawatomie and Great Nemaha.	Sac (Sauk) and Fox of the Missouri	*e*8,013	12½	Treaties of May 18, 1854, vol. 10, p. 1074, and of March 6, 1861, vol. 12, p. 1171; acts of Congress approved June 10, 1872, vol. 17, p. 391, and August 15, 1876, vol. 19, p. 208.
Sioux (addition)	Pine Ridge	Ogalalla Sioux	32,000	50	Executive order, January 24, 1882.
Winnebago	Omaha and Winnebago.	Winnebago	*e*108,924	170	Act of Congress approved February 21, 1863, vol. 12, p. 658; treaty of March 8, 1865, vol. 14, p. 671; act of Congress approved June 22, 1874, vol. 18, p. 170; deed from Omaha Indians, dated July 31, 1874.
Total			422,358	660	
NEVADA.					
Duck Valley (*m*)	Western Shoshone	Western Shoshone	243,200	380	Executive order, April 16, 1877.
Moapa River	Nevada	Kai-bab-bit, Kemahwivi (Tantawait), Pawipit, Pai-Ute, and Shiwits.	*d*1,000	2	Executive orders, March 12, 1873, and February 12, 1874; act of Congress approved March 3, 1875, vol. 18, p. 445; selection approved by Secretary of Interior, July 3,1875.
Pyramid Lake	do	Pah-Ute (Paviotso)	*d*322,000	503	Executive order, March 23, 1874.
Walker River	do	do	*d*318,815	498	Executive order, March 19, 1874.
Total			885,015	1,383	

a Approximate
d Out boundaries surveyed
e Surveyed
f Partly surveyed
g Includes 5,120 acres in Kansas
h Includes 2,862.03 acres in Kansas
k In Minnesota and Wisconsin
l In Kansas and Nebraska
m Partly in Idaho

[445] No. 54.

OMAHA AGENCY, NEBRASKA,
Eighthmonth 21, 1871.

RESPECTED FRIEND: The following annual report of the affairs of this agency is herewith submitted:

During the past year the hopes heretofore cherished in relation to the capacity and inclination of these Indians to engage in agricultural pursuits, and to adopt the habits of civilized life, have been more than realized. A steady advance in the direction indicated has been observable throughout the year. Especially has the disposition to labor in the field been manifested in striking contrast with their former slothfulness. This fact has been observed and commented upon by most of those who have visited the agency. Their tendency to nomadic habits seems to have been totally abandoned, and few of them are now inclined to leave their reservation, unless when called away by special business; in such cases they request a pass from their agent.

A lively interest is manifested among them upon the subject of education. Three schools, two of which have been established within the past year, have been well attended. These are all day-schools. The progress of the children in study has been highly encouraging and satisfactory. Through the liberality of Friends of Indiana yearly meeting, who exercise a special supervision over the affairs of this agency, nearly all the school-children, and many aged and infirm persons, have been comfortably clothed and furnished with

other needed supplies. Reference is invited to the accompanying reports of the school-teachers upon this deeply interesting engagement, the successful prosecution of which is so essential to the future prosperity of these people.

The subject of finances seems to be the principal, if not the only, source of embarrassment or discouragement. The earnest appeal made to Congress at its recent session, by the chiefs on behalf of the tribe, [446] and unanimously sanctioned by the Indians, to provide for the enactment of a law authorizing the sale of 50,000 acres of the most western portion of their reservation for their benefit, was rejected, for the reason, it is alleged, that the bill submitted to Congress embraced other subjects not sufficiently matured for its favorable action. The Indians are thus left almost wholly destitute of available resources for purposes of general improvement – such as building houses on the farms recently allotted to them in severalty, and providing teams, agricultural implements, seeds, &c., to enable them to engage in farming pursuits with profit and success. On this account the building of houses by the Indian carpenters, engaged in during the past year with so much interest and success, as well as many other improvements on the reservation, are now necessarily suspended for want of funds; and fears are entertained that the Indians may relapse into their former habits of indolence and improvidence, and thus become a burden to the Government and a discredit to the humane policy it has so wisely inaugurated. For this

cause I most earnestly desire and request that Congress, at its approaching session, will, at an early day, favorably consider the reasonable and earnest prayer of these people to provide for the sale of so much of their surplus lands as will enable those placed in charge of them to proceed vigorously with the work of civilization and improvement so long urged upon them by the Government.

FARMING OPERATIONS.

The growing interest of the Indians in the products of the soil has been exemplified, during the present season, in the marked improvement in the cultivation of their crops compared with former years. Notwithstanding a protracted drought throughout the summer, and still prevailing here, it is conceded that the crops this year are the best and most abundant ever raised upon this reservation. The Indians will have a large surplus of corn for sale, and wheat enough to supply their wants during a large proportion of the coming year; potatoes, beans, squashes, and other garden vegetables are also quite plentiful. Nearly all of the Indians have built substantial granaries for storing their corn, instead of burying it in the ground, as was their former custom, where a large proportion of it was generally damaged and unfit for use. Many of them have been engaged during the summer in plowing and opening farms on their individual allotments of land, and all seem anxious to be settled in their respective homes. Farm labor is now performed almost exclusively by Indian men, the

females being thus relieved from the oppressive drudgery hitherto required of them.

BUILDINGS AND IMPROVEMENTS.

From five to ten Indian carpenters have been engaged since last report in building and various other improvements on the reservation, until these operations were necessarily suspended for want of funds. Six comfortable and substantial frame cottages for the Indians, each with five rooms and a neat piazza in front, have been built on their several allotments; also a large double house, with ten rooms, for the accommodation of teachers, and a commodious school-house, besides building several bridges, a large ferry-boat, and more than twenty sleds for hauling logs, &c. These are among the results of the labor of these Indian apprentices. The rapid advances made by them in knowledge of the mechanic arts are very encouraging and gratifying.

[447] STOCK AND FARMING IMPLEMENTS.

There has been a considerable increase in the number of young cattle owned by the Indians since last report. They are ever on the alert for breaking a pair of young oxen whenever they arrive at a suitable age, and are becoming quite skillful in the management of their ox-teams. Occasionally they exchange their ponies for young cattle, which is a step in the right direction. One grain-reaper and one new mower have been added to the stock of farming implements since last year; but the want of a full supply of plows,

wagons, harness, and other appliances for conducting farming operations successfully is still felt to be a source of discouragement.

EDUCATIONAL.

The efforts directed toward the improvement of the mental and moral condition of the Omaha Indian children during the past year have been crowned with eminent success. The desire for acquiring knowledge seems to be the most prominent inducement for the very regular attendance of the children, added to the encouragement they continually receive from their parents. As an evidence of the interest felt by the Indians in the subject of the education of their children, I may notice the fact that many of the parents moved their tents to a position near the school-houses, so as to afford greater facilities for their regular attendance, a concession rarely to be met with among Indians. The institution of Firstday (or Sunday) schools has also been found quite beneficial; and recently sewing-schools for the instruction of girls, and arrangements for teaching Indian women to cut out and make up garments, have been added to their advantages. Still there is a great need felt for the establishment of an industrial school for the benefit of both sexes, though the want of funds is painfully felt to preclude all hope in this direction at present.

CONCLUDING REMARKS.

A residence of more than two years among these people, and my opportunities for free intercourse with

Indians of various other tribes, fully confirm me in the belief that the Indians, as a class, are tractable, and easily governed by a system of uniform kindness and justice, coupled with resolute firmness in the right on the part of those appointed to manage their affairs. The reverse is certainly exceptional. When once the full confidence of an Indian is gained, the victory is won.

The question as to the capacity of these people to become elevated to the plane of civilization and enlightenment, as well as self-supporting, at no distant day, and not only to receive intellectual culture with facility, but to become imbued with the divine influences of Christianity, now remains no longer a problem. To promote these humane and charitable objects needs only the fostering hand of the Government, and the honest and earnest labors of those delegated to watch over their interests; and surely a people to whom this great and flourishing Republic is so largely indebted for the prosperity and happiness of its teeming millions can justly lay claim not only to the kindness and sympathy of the Government, but to the adoption of a liberal and extended policy on their behalf.

Very respectfully, thy friend,

E. PAINTER,
United States Indian Agent for the Omahas.

SAMUEL M. JANNEY,
Superintendent Indian Affairs, Omaha, Nebraska.

42ND CONGRESS } SENATE { MIN. DOC.
2d Session } { No. 41

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

ADDRESSED TO

HON. JAMES HARLAN, CHAIRMAN OF THE COMMITTEE ON INDIAN AFFAIRS

TRANSMITTING

Copy of a communication from the Commissioner of Indian Affairs, and copies of accompanying papers from the committee of Friends, in relation to the disposition of portions of Indian reservations in the Northern Superintendency.

JANUARY 22, 1872 – Ordered to be printed, to accompany bill S. No. [illegible]

DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 19, 1872.

SIR: I have the honor to transmit herewith a copy of a communication, dated the 21st ultimo, from the Commissioner of Indian Affairs, and accompanying papers from the committee of Friends, in relation to the disposition of portions of Indian reservations in the northern superintendency, together with the draughts of bills which, in the opinion of the Department, will accomplish the objects contemplated.

Concurring with the committee of Friends and with the Commissioner of Indian Affairs in their views as contained in the papers submitted, I have the honor to commend the subject to the favorable consideration of Congress, and to request that the sum of one hundred thousand dollars be appropriated for the use of the various tribes, said amount to be refunded out of the first proceeds of the sales of the lands to be disposed of as contemplated by the proposed legislation.

I have the honor to be, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

The CHAIRMAN *of the Committee on Indian Affairs,*
United States Senate.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
December 21, 1871.

SIR: I have the honor to submit herewith for your consideration a communication (with inclosures) addressed to the Department under date of the 1st instant, by Samuel M. Janney, late superintendent of Indian affairs, and others, members of "a committee on Indian affairs to represent the six yearly meetings of Friends, to whose care were committed by the Government the Indians" in the northern superintendency, representing:

First. That the necessary improvements for the Omahas, the Pawnees, and the Ottoes, will require

for their successful operation a much larger amount of funds than is now supplied by the annuities of said tribes.

Second. That the reservation of the Omahas contains 205,000 acres, of which amount they petition Congress to make provision for the sale of 50,000 acres for the purpose of establishing and supporting schools. &c.

Third. That the Pawnee reservation contains 288,000 acres, of which amount the chiefs and head men ask that provision be made for the sale of 50,000 acres to enable the tribe to procure agricultural implements, &c.

Fourth. That the reservation of the Ottoes and Missourias contains 160,000 acres, and for the same reasons they request the sale of 80,000 acres.

Fifth. That the Sac and Fox Indians have expressed a desire to remove to the Indian Territory and dispose of their reservation, said to contain 16,000 acres.

The committee of Friends request the aid of this Department for the purpose of preparing a bill for submission to Congress to carry out the objects in view, and inclose draughts of the same.

The committee add that it will be some months, and probably a year, before the funds from the sale of the lands they propose to be sold can be realized; and they therefore suggest that Congress be asked to appropriate one hundred thousand dollars for the use

of the tribes referred to; to be refunded out of the first proceeds of said sales.

The foregoing recommendations of the committee of Friends are approved.

I believe that the general idea, of diminishing these reservations for the purpose of securing a higher cultivation of the remaining lands, is consonant with sound policy, and that the amount indicated in each case to be sold is, as nearly as it is possible to determine, the amount which can advantageously be sold at the present time. I believe further that the particular portions of these lands thus to be disposed of have been carefully and judiciously selected, with a view to the interests of the tribes themselves, and I have, therefore, the honor to recommend that Congress be asked to authorize the Secretary of the Interior to proceed to dispose of these lands for the benefit of the tribes to which they respectively belong, in substantial compliance with the plan proposed by the committee of Friends.

A draught of a bill, calculated, in the view of this office, to accomplish the desired results most beneficially, is inclosed herewith.

Very respectfully, your obedient servant,

F. A. WALKER,
Commissioner

The Hon. SECRETARY OF THE INTERIOR

SANDY SPRING, *Twelfthmonth* 1, 1871

RESPECTED FRIEND: We, the undersigned, having been appointed a committee on Indian affairs, to represent the six yearly meetings of Friends, to whose care were committed by the Government the Indians in the northern superintendency, respectfully represent: That the improvements on the reservations of the Omahas, the Pawnees, and the Ottoes, already commenced with encouraging prospects, will require for their successful prosecution a much larger amount of funds than is now supplied by their annuities. These tribes have always obtained their subsistence in part by hunting the buffalo, and at this time they continue the practice, which we believe has a tendency to retard their civilization: but their most sagacious chiefs and head men are convinced that their hunting-grounds will soon be occupied by white men, and therefore are turning their attention to the pursuits of agriculture and grazing as an imperative necessity.

The reservation of the Omaha Indians contains 205,000 acres, a part of which has been allotted in severalty to families and to individuals, who are now engaged in improving their farms and building houses.

To forward this work, as well as to supply them with implements of agriculture and live stock, and to establish and support an industrial boarding-school and other preparatory schools, a large amount of funds will be required. They have accordingly petitioned

Congress to make provision at as early a day as practicable for the sale of fifty thousand acres of their land.

The Pawnee Indians, whose reservation contains 288,000 acres, being desirous of opening farms and building houses, procuring implements of agriculture and live stock, and promoting their general welfare, have, through their chiefs and headmen, requested that fifty thousand acres of their lands may be sold at their fair market value.

The Ottoe and Missouria tribe of Indians, whose reservation contains 160,000 acres, have for the same reasons requested the sale of eighty thousand acres of their lands.

At a council of the Sac and Fox of Missouri tribe of Indians, held on the 31st of the 10th month last, they informed Superintendent Barclay White that they were willing to sell their reservation and remove near the Sac and Fox Indians in the Indian Territory. They number about eighty persons, and their reservation is said to contain sixteen thousand acres. As they are dissatisfied with their present condition, we recommend that their wishes be complied with, and measures taken to obtain full market value for their lands.

As an act of Congress will be required authorizing the sale of the lands aforesaid and the appointment of commissioners by the President to effect the same, we respectfully request thy aid in preparing a bill for that purpose and submitting it to Congress.

The improvements commenced on the Omaha, Pawnee, and Ottoe reservations are now nearly at a stand for want of funds, and in case the bill providing for the sale of part of their lands should be passed by Congress it will be some months, and probably a year, before funds from that source can be realized.

We therefore suggest that Congress be asked to appropriate one hundred thousand dollars for the use of those three tribes to be refunded out of the first proceeds of sales of their lands.

Very respectfully, thy friends,

SAM'L M. JANNEY.
BENJ'N HALLOWELL.
B. RUSH ROBERTS.
RICH'D T. BENTLEY.

C. DELANO,
Secretary of the Interior, Washington, D. C.

To the Senate and House of Representatives of the United States in Congress assembled:

We, the undersigned, Chiefs, police, and headmen of the Omaha tribe of Indians, respectfully represent:

That our people are desirous of improving in civilization, and of adopting the pursuits of agriculture as a means of subsistence and having recently received allotments of our lands in severalty with a view of establishing thereon permanent homes for our

people, our present annuity of $20,000 is found insufficient for the purposes of building houses, opening farms, and providing stock, farming implements, and other appliances necessary for success in agricultural pursuits. We therefore earnestly renew the petition presented to Congress at its last session, to make provision at as early a day as practicable for the sale of as near 50,000 acres of the most western portion of our reservation as can be separated from the remainder by a line running along the section-lines from north to south, and that the proceeds of the said sales may be appropriated for the building of houses, opening of farms, and other beneficial purposes as aforesaid.

We earnestly represent that the advancement of our people in civilization is much retarded by the want of means to settle them in permanent homes, and respectfully petition that funds for that purpose be made available at as early a day as is consistent with the wisdom of Congress.

STANDING HAWK, *Chief*, his x mark.
FUI, *Chief*, his x mark.
YELLOW SMOKE, *Chief*, his x mark.
HARD WALKER, *Chief*, his x mark.
MA-HA-NERLIA, *Chief*, his x mark.
SHON-GA-SKAH, *Chief*, his x mark.
EBA-HORNBA, *Chief*, his x mark.
LION, *Chief*, his x mark.
GI-HE-GA, his x mark.

L. SANNSICI, *United States Interpreter*,
his x mark.
H. FONTENELLE, *ex-Interpreter*, his x mark.
JIM DICK, his x mark.
WAH-SHA-SHA, his x mark.
TA-NOO-GA, his x mark.
TA-NOO-GA-NEMBA, his x mark.
ECO-HABBEE, his x mark.
MA-HA-WALKA, his x mark.
ISH-OGGA-WA-HERA, his x mark.
ZHINGA-GI-HE-GA, his x mark.
RES-NA-HUNGA, his x mark.
SE-MICCA-SEE, his x mark.
O-HUNGA-MO-NI, his x mark.
WAH-MAH-ZHE-KE-UBBE, his x mark.
MAH-A-GA-HE, his x mark.
WAH-TON-AH-ZHE, his x mark.
PIL-ZE-NIN-GA, his x mark.
PAW-NEE-MUN-PA-ZHE, his x mark.
NA-HOGGA, his x mark.
MEIHOPPA-ZHINGA, his x mark.
WAH-NAH-SANDA, his x mark.

L. SANNSICI, *United States Interpreter*,
his x mark.
H. FONTENELLE, *ex Interpreter*,
his x mark.
L. H. FELT, *Citizen*.
E. PAINTER, *United States Indian Agent*.

OMAHA AGENCY, *Tenthmonth* 27, 1871

* * *

FORTY-SECOND CONGRESS.

SESS. II.

CH. 434-436.

1872

[391] CHAP. CDXXXVL – *An Act for the Relief of certain Tribes of Indians in the northern Superintendency.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent and concurrence of the Omaha tribe of Indians, expressed in open council in the usual manner, the Secretary of the Interior be, and hereby is, authorized, to cause to be surveyed, if necessary, a portion of their reservation in the State of Nebraska, not exceeding fifty thousand acres, to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south. The said lands so separated shall be appraised by three competent commissioners, one of whom shall be selected by said Omaha tribe of Indians in open council, and the other two shall be appointed by the Secretary of the Interior. After the survey and appraisement of said lands, as herein provided, the Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale for cash in hand; and sealed proposals, duly invited by public advertisements, shall be received for the same for tracts not exceeding one hundred and sixty acres each, and also for the entire body offered; and he shall be, and

hereby is, authorized to accept the proposal for the entire tract, or the highest bids for separate tracts, whichever shall be deemed best for the interests of the Indians: *Provided*, That no bids for separate tracts shall be accepted which may be less than the appraised value of such tract, nor less than one dollar and twenty-five cents per acre; or for the entire tract which shall be less than the aggregate appraised value of the same, nor less than one dollar and twenty-five cents per acre. The proceeds of such sale shall be placed to the credit of said Indians on the books of the treasury of the United States, and bear interest at the rate of five per centum per annum, payable semiannually, except such portion thereof as the Secretary of the Interior, with the approval of the President of the United States, may deem necessary to be expended for their immediate use in improving and fencing farms, building houses, purchasing implements of agriculture and live stock, and in establishing and supporting schools: *Provided also*, That not more than twenty-five per centum of the principal of the aggregate amount of sales of said lands shall be expended in any one year: *Provided*, That no sale shall be approved unless the average sales of each of said parcels of said land shall be at least two dollars and fifty cents per acre.

SEC. 2. That with the consent and concurrence of the Pawnee tribe of Indians, expressed in open council in the usual manner, the Secretary of the Interior be, and hereby is, authorized to cause to be surveyed, if necessary, [392] a portion of their reservation in the

State of Nebraska, not exceeding fifty thousand acres, to be taken from that part of said reservation lying south of Loup Fork. The said lands so surveyed shall be appraised by three competent commissioners, one of whom shall be selected by the said Pawnee tribe of Indians in open council, and the other two shall be appointed by the Secretary of the Interior. After the survey and appraisement of said lands, as herein provided, the Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale, for cash in hand, in the same manner and with the same restrictions as provided in the first section of this act relating to the Omaha lands; and the proceeds of such sale shall be placed to the credit of said Indians on the books of the treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually, except such portion thereof as the Secretary of the Interior, with the approval of the President of the United States, may deem necessary to be expended for their immediate use, as directed in the said first section of this act.

SEC. 3. That with the consent and concurrence of the Otoe and Missouria tribe of Indians, expressed in open council in the usual manner, the Secretary of the Interior be, and hereby is, authorized to cause to be surveyed, if necessary, a portion of their reservation lying in the States of Nebraska and Kansas, not exceeding eighty thousand acres, to be taken from the western part thereof lying west of the Big Blue river, part of said tract lying in the State of Nebraska, and part lying in the State of Kansas. The said lands so

surveyed shall be appraised by three competent commissioners, one of whom shall be selected by said Otoe and Missouria tribe of Indians in open council, and the other two shall be appointed by the Secretary of the Interior. After the survey and appraisement of said lands, as herein provided, the Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale, for cash in hand, in the same manner and with the same restrictions as provided in the first section of this act relating to the Omaha lands; and the proceeds of such sale shall be placed to the credit of said Indians on the books of the treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually, except such portion thereof as the Secretary of the Interior, with the approval of the President of the United States, may deem necessary to be expended for their immediate use as directed in the said first section of this act.

SEC. 4. That with the consent and concurrence of the Sac and Fox of the Missouri tribe of Indians, expressed in open council in the usual manner, the Secretary of the Interior be, and hereby is, authorized to cause to be surveyed, if necessary, a portion or the whole of their reservation in the State of Nebraska, containing about sixteen thousand acres. The said lands so surveyed shall be appraised by three competent commissioners, one of whom shall be selected by said Sac and Fox of the Missouri tribe of Indians in open council, and the other two shall be appointed by the Secretary of the Interior. After the survey and appraisement of said lands, as herein provided, the

Secretary of the Interior shall be, and hereby is, authorized to offer the same for sale, for cash in hand, in the same manner and with the same restrictions as provided in the first section of this act relating to the Omaha lands; and the proceeds of such sale shall be placed to the credit of the said Indians on the books of the treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually, except such portion thereof as the Secretary of the Interior, with the approval of the President of the United States, may deem necessary to be expended for their immediate use, as directed in the said first section of this act, or for their removal to the Indian Territory or elsewhere, in case they desire to remove.

SEC. 5. That in all patents of lands sold nnder authority of this act, there shall be inserted a clause forever prohibiting the sale of intoxicating [393] liquors on said lands, under pain of forfeiture of title thereto; and due notice of this provision shall be given in the advertisement offering said lands for sale.

SEC. 6. That the commissioners to be appointed by the Secretary of the Interior, under the provisions of this act, shall receive compensation for their services at the rate of eight dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual travelling and other necessary expenses.

APPROVED, June 10, 1872.

Department of the Interior
Office Indian Affairs
Washington, DC

October 12, 1872

Sir,

Having been appointed by the Honorable Secretary of the Interior as appears by his letter to this office of date the 31st of July last, a Commissioner in conjunction with Hon. Joseph Fox of Omaha, Nebraska to be associated with United States Indian Agent Edward Painter, a Commissioner selected by the Omaha tribe of Indians, for the purpose of appraising a portion of the reservation of said Indians the State of Nebraska, the following detailed instructions are given for your guidance, viz:

The Commission will meet at the Omaha Agency, Nebraska, on Tuesday the 22nd instant, and immediately enter upon the discharge of the duties assigned to it. The 1st Section of An Act for the relief of certain tribes of Indians in the northern superintendency approved June 10th, 1872 (copy herewith) in accordance with which your appointment has been made provides, that with the consent and concurrence of the Omaha tribe of Indians expressed in open council in the usual manner the Secretary of the Interior be, and he is hereby authorized to cause to be surveyed, if necessary, a portion to this reservation in the State of Nebraska, not exceeding fifty thousand acres to be taken from the western part thereof and to be separate from the remaining portion of said reservation by

a line running along the section lines from north to south. The said lands so separated shall be appraised by thee competent commissioners, one of whom shall be selected by said Omaha tribe of Indians in open council, and the other two shall be appointed by the Secretary of the Interior.

The consent of the tribe has already been obtained and the selection of a Commissioner in the person of their Agent made by them.

For the purpose of separating as near as can be done the lands to be appraised in accordance with the terms of the above quoted provisions, that portion of the reserve lying west of the following line, running along the section lines will be the line of separation: viz:

Commencing at a point where the line dividing sections 11 and 12 of township 25 north, range 6 E. of 6th Principal Meridian crosses the north boundary of the Omaha Reserve, thence running south with said division line to the corner of sections 13, 14, 23 and 24; thence east on the line dividing sections 13 and 24 of said Township and Range, to be south east corner of section 13: thence south with the line dividing Ranges 6 & 7 E. to the south east corner of section 36; thence on the line of the 6th standard parallel, as far west as the north east corner of section 1, Township 24 [illegible] Range 6 E.; thence south with the line dividing ranges 6 & 7 to where the south boundary of the Omaha reserve crosses the same being all of townships 24 and 25, N Range 5 E. and townships 24

& 25 N. Range 6 E. embraced within the limits of said reservation with the exception of sections 12 and 13. Township 25 N Range 6 E. containing in the aggregate 49.692.43 acre.

The appraisal will be made in tracts of 160 acres each except in cases where it is thought the land will sell better, in which cases the appraisements may be made in tracks of 80 or 40 acres each. In appraising these lands, the Commission will be governed by the present value of each tract and will not permit itself to be influenced by the representatives of outside parties.

For the assistance of the Commission in locating these lands to be appraised, I transmit herewith plats showing the subdivisions of the same; I also transmit herewith a book containing the descriptions of said lands by legal subdivisions with forms to be filled out by the Commission. This book is for use in the field, and will serve to make up the report of appraisal on the blank forms transmitted herewith. The said report must be carefully and critically examined, and repeated comparisons made to insure its correctness in the descriptions of the tracts, and the value of the same. The experience of this office teaches that the greatest care must be taken in these particulars to insure accuracy, and that the descriptions of the tracts, the figures representing the appraised value to should be plainly and carefully written. The report of appraisal will commence with the lowest numbered sections in the lowest numbered township and range, and will proceed to the highest of each in their order.

A journal of the proceedings of the Commissioner showing the duty performed each day will be reported and transmitted to this office with its final report.

In accordance with the provisions of the Act under which you have been appointed, your compensation will be at the ratio of eight dollars per day, while actually engaged in the performance of the duties hereby assigned you, in addition to your actual travelling and other necessary expenses.

Very Respectfully

FA Walker
Commissioner

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

CONGRESSIONAL RECORD – SENATE.

FEBRUARY 20,

* * *

[1282] REPORTS OF COMMITTEES.

Mr. ANTHONY. The Committee on Printing, to which was referred the joint resolution (S. R. No. 22) to compensate the employés of the Bureau of Engraving and Printing for lost time, have instructed me to ask to be discharged from its further consideration, and that it be referred to the Committee on Appropriations. It involves an appropriation of money, and relates to the Bureau of Engraving and Printing, which is not within the jurisdiction of the Committee on Printing.

The report, was agreed to.

Mr. McDILL, from the Committee on Public Lands, to whom was referred the bill (S. No. 926) to create three additional land districts in the Territory of Dakota, reported it with an amendment, and submitted a report thereon, which was ordered to be printed.

Mr. ROLLINS. The Committee on Public Buildings and Grounds, to whom was referred the bill (S. No. 872) authorizing and directing the purchase by the Secretary of the Treasury, for the public use, of

the property known as the Freedman's Bank, and the real estate and parcels of ground adjacent thereto, belonging to the Freedman's Savings and Trust Company, and located on Pennsylvania avenue, between Fifteenth and Fifteenth-and-a-half streets, Washington, District of Columbia, a bill introduced by the Senator from Arkansas, [Mr. GARLAND,] have directed me to report it back, with the recommendation that it be indefinitely postponed, a similar bill having already passed the Senate.

Mr. GARLAND. I have no objection to the indefinite postponement of the bill.

The PRESIDENT *pro tempore*. The bill will be indefinitely postponed, if there be no objection.

Mr. ROLLINS, from the Committee on Public Buildings and Grounds, to whom was referred the bill (S. No. 911) to provide for the erection of a public building for the use of the United States courts, postoffice, and other Government offices in the city of Carson City, in the State of Nevada, reported it with an amendment.

Mr. PLUMB, from the Committee on Public Lands, to whom was referred a memorial of citizens of the United States, remonstrating against the confirmation of the Socorro land grant, asked to be discharged from its further consideration, and that it be referred to the Committee on Private Land Claims; which was agreed to.

He also, from the Committee on Public Lands, to whom was referred the bill (S. No. 589) for the relief of Sarah McDonald, reported it without amendment.

He also, from the same committee, to whom was referred the bill (S. No. 311) granting to California 5 per cent of the net proceeds of the sale of public lands in that State, reported it with amendments.

Mr. WALKER. I am directed by the Committee on Public Lands, to whom was referred a message of the President of the United States, transmitting a letter from the Secretary of the Interior relative to the Hot Springs reservation in Arkansas, to report it back with a statement that the committee are of opinion that all net proceeds arising, or that may arise, from said reservation should be appropriated to the improvement thereof. We ask to be discharged from the further consideration of the communication and that it be referred to the Committee on Appropriations.

The report was agreed to.

Mr. GROVER, from the Committee on Public Lands, to whom was referred the bill (S. No. 171) in relation to certain fees allowed registers and receivers, reported it with an amendment.

Mr. SAUNDERS, from the Committee on Indian Affairs, to whom the subject was referred, reported a bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes; which was read twice by its title, and, on motion of Mr.

SAUNDERS, recommitted to the Committee on Indian Affairs.

Mr. HILL, of Colorado, from the Committee on Public Lands, to whom was referred the bill (S. No. 698) relating to lands in Colorado lately occupied by the Uncompahgre and White River Ute Indians,

* * *

[3027] OMAHA INDIAN RESERVATION.

The bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians, in the State of Nebraska, and for other purposes, was announced as first in order upon the Calendar, and the Senate, as in Committee of the Whole, proceeded to consider the bill.

The PRESIDENT *pro tempore*. The bill was reported from the Committee on Indian Affairs with amendments, which will be stated in order.

Mr. COCKRELL. I should like to understand the bill before we pass upon the amendments.

The PRESIDENT *pro tempore*. The report can be read.

Mr. COCKRELL. There is no report accompanying the bill, and that is the reason why I ask the Senator from Nebraska [Mr. SAUNDERS] to make an explanation of the necessity for this legislation.

Mr. SAUNDERS. This subject has been in various shapes before the Senate for some length of time,

the effort being to get a bill that would meet the wants of the Indians and at the same time give satisfaction to the Government. After making several efforts, the Committee on Indian Affairs authorized the reporting of this bill with the amendments that will now be stated from the Secretary's desk. The bill authorizes the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha reservation. This land has no settlers upon it, as we are able to show from the papers and from the agent himself, and is yielding nothing to the Indians, nothing to the Government, and nothing to the country. It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed. The Indians want it passed so as to put the money derived from the sale on interest. The white people are there ready to buy the land and put it in cultivation. The Indian Department is satisfied that it is best for the Indians and for the country to have the land sold. Therefore, unless some amendment should be suggested by some one to the bill, there is no objection to the passage of a bill of this kind. When the amendments have been acted on, if the Senator from Missouri or any other Senator has any suggestions to make I shall be very glad to hear them. We want to get the bill as nearly perfect as we can.

The PRESIDENT *pro tempore*. The amendments of the Committee on Indian Affairs will be reported.

[3028] The ACTING SECRETARY. In section 2, line 4, after the word "bidder," it is proposed to strike out the words "between the hours of twelve meridian and two

post meridian on a given day in each month at," and to insert "through;" so as to read:

> That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to offer the same for sale, for cash, to the highest bidder, through the United States public land office, at Neligh, Nebraska.

Mr. ALLISON. What is the object of that amendment?

Mr. SAUNDERS. It is to effect the sale through the agency instead of at the agency, by sending an agent from the land office to receive the bids on the ground.

The amendment was agreed to.

The next amendment was, after the word "Nebraska," in section 2, line 6, to insert "under such instructions as the Secretary of the Interior may issue."

The amendment was agreed to.

The next amendment was to strike out section 6, in the following words:

> That the Secretary of the Interior may, with the consent of the Indians expressed in open council, secure other reservation lands upon which to locate said Indians, cause their removal thereto, and expend such sum as may be necessary for their comfort and advancement in civilization, not exceeding

> $100,000, including cost of surveys and expense of removals, the same to be drawn from the fund arising from the sale of their reservation lands under this act.

Mr. SAUNDERS. The reason for striking out section 6 is that it was found entirely unnecessary. The Indians are not proposing to leave that part of the country and settle elsewhere. They have plenty of land left, and propose to remain there; so that it was found entirely unnecessary to provide for their being settled in any other part of the country.

The amendment was agreed to.

The next amendment was to insert as an additional section:

> SEC. 6. That in addition to the purchase-money, each purchaser of said Omaha Indian lands shall pay $2, the same to be retained by the receiver and the register of the land office at Neligh, Nebraska, as their fees for services rendered.

The amendment was agreed to.

Mr. SAUNDERS. I move, at the end of section 2, to add the following additional proviso:

> *And provided further*, That not more than one hundred and sixty acres of said land shall be sold to any one person.

I think there will be no objection to the amendment on the part of any Senator.

The amendment was agreed to.

Mr. INGALLS. As one member of the committee that reported this bill, there is a provision to which I could not give my assent. It involves a very important question, and in order to test the sense of the Senate upon the point involved I move to strike out, in section 4, that portion of the proviso between lines 6 and 11 proposing to exempt these lands from taxation. The proviso reads as follows:

> *Provided*, That patents issued to Indians shall expressly state that the lands conveyed shall, for the period of twenty-five years from the date thereof, be in alienable and exempt from incumbrance and taxation, and that the title in its descent shall conform to the laws of the State of Nebraska.

It will be observed that this bill practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers. It also enables Indians who may desire to possess their lands in severalty to acquire a qualified private title. The lands that they occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished. So far as the laws are concerned, so far as the authority of the constitution and statutes of the State of Nebraska are concerned, these lands hereafter to be occupied by the individual Indians are like those held by any other private title from the Government of the

United States. The question is whether this land, being so held, the Government having relinquished its jurisdiction, it is competent for Congress, without the consent of the authorities of the State of Nebraska, to say that this land shall be for twenty-five years subject to the protection of the laws of that State and entirely exempt from taxation. I say that obviously upon the plainest principles of law it is not; and in order to test the sense of the Senate upon that proposition I move to strike out the words "and exempt from incumbrance and taxation" after "inalienable," in lines 9 and 10 of section 4 of the bill.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Kansas, [Mr. INGALLS.]

Mr. DAWES. Mr. President, the Senator from Kansas, I think, I stated when he moved the amendment that it was an important one, and correctly. It strikes directly at the efforts which are being made to civilize the Indians by means of making them agriculturists upon land of their own. It is an attempt to push the Indian out into the world without any care of him or any superintendent exercise of authority over him and over the property upon which he is to be placed. Without the Senator from Kansas intending any such result, his amendment is in its effect a provision by which an Indian can be most quickly and effectually deprived of his land; it is, in the language of one of the clearest-headed of all the Indians I have met, a method by which he would be in a very few

months stripped as naked as a bird. That was the manner in which he expressed it.

There may be exceptions, but a majority of the Indians who are not as yet upon land in severalty are not so far advanced that putting them upon a portion of land with a patent in fee without any restrictions would enable them to take care of what they have and thereby of themselves. If we are to set an Indian up in severalty we must throw some protection over him and around him and aid him for awhile in this effort; we must countenance the effort; we must hold up his hand; we must instruct him how to maintain himself and how to regard the property through which he is to become self-sustaining. I know the Senator from Kansas does not desire to facilitate the preying upon the Indians by white men; but nothing can be so easy as to obtain from an Indian incumbrances upon his land which are equivalent to a conveyance of it.

Mr. INGALLS. My object is purely to test the question upon the right of Congress to exempt property from taxation within the limits of a State.

Mr. DAWES. I am aware of that.

Mr. INGALLS. I do not wish to include voluntary incumbrances; I think they ought to be excluded; but I want to come down to the simple naked proposition whether, under the Constitution and laws of this Government, Congress can exempt property in a State from taxation when vested in private hands.

Mr. DAWES. Perhaps the amendment of the Senator from Kansas goes beyond that and includes incumbrances by which as I understand him he does not mean any other except those involuntary incumbrances that come from enforcing the payment of debts and the like upon the Indian's land, which is another method of allowing him, an improvident, weak-minded man, unable himself at present to take care of himself, yet to be supposed to be in a condition where he can be led up to it and be made the prey of a sharper or any one with whom he may deal, to incur an obligation for the very purpose of using that obligation to despoil him. Unacquainted with the methods of meeting taxation and paying taxes, and redeeming lands sold for taxes, he can be stripped in that method of his lands. If it be worth while to make the experiment of trying to make an Indian self-supporting by means of teaching him the value of property and the indirect beneficial results that come from earning a livelihood upon property which is his own, it is worth while to use these ordinary instrumentalities that will keep him a ward of the nation let out from under our care only so far as his progress will show him capable of doing it.

The Senator from Kansas wants to test the power of the United States to exclude from taxation and from involuntary incumbrance any land which is now theirs, when they part with it to an Indian.

Mr. INGALLS. Not so broad as that.

Mr. DAWES. The Senator does not intend it, I know.

Mr. INGALLS. I said expressly within the limits of a State.

Mr. DAWES. Of course I mean within the limits of a State.

Mr. INGALLS. I did not speak of the power of the Government over land in the Territories. That is not touched.

Mr. DAWES. I am aware of that. The Senator wishes, if I may state it again, to test the power of the United States in any State to exempt, when it parts with land to an Indian, from taxation or involuntary incumbrance for a certain number of years that land which, while the United States does own it, is confessedly so exempt. If the United States has the power in the States to keep its own land for the use of the Indian free from taxation or involuntary incumbrance, then it seems to me that it can, whenever it conveys to the Indian that land which is held for that purpose, convey it upon such terms as it pleases.

I am not aware, Mr. President, of any decision of the Supreme Court adverse to the position of this bill. I have not been able to find any.

The PRESIDENT *pro tempore*. The time of the Senator from Massachusetts is up.

Mr. DAWES. If the Senate will indulge me, that I may say a few words more, I move to indefinitely

postpone the bill. I will not trespass long upon the indulgence of the Senate.

The committee have not been able to find any authority to question the position taken in the bill. It has been one uniformly adopted. The Omahas occupy this land under treaty stipulations with the United States, equivalent to holding it by a grant from the United States, not in so many words, but equivalent in effect, and in that very treaty is a stipulation that they shall have their land in severalty whenever they desire. This provision in this bill is recognizing that authority in the treaty, and if the Senate shall decide now that it is beyond their power in the States to do this they reverse their uniform and unquestioned action in this matter for a long series of years, and they will do what in my judgment will be fatal to the success of the experiment of setting up an Indian upon land in severalty in the hope that he will be taught in that way to become a self-supporting citizen of the United States. I hope, therefore, that the amendment will not prevail.

I withdraw the motion to postpone indefinitely.

Mr. JONES, of Florida. Mr. President, in respect to this power of taxation it will be observed that in all the land States it was expressly stipulated in their acts of admission into the Union that they would not tax the public lands of the United States, and I presume that if these stipulations had not been made it might have been a question whether these lands could have remained exempt. Mr. Sumner was of

opinion in his day that they could not. He took the ground, and there was great reason for it, that the lands held by the United States as a public proprietor, not needed for public [3029] uses, were just as much in equity bound to contribute to the burden of taxation of the State as any other lands within the State; and in a great argument which he made in the Senate in behalf of the struggling Western communities who were seeking aid to build railroads there, he was in favor of extending to them liberal donations of public land, and he put his argument on the ground that the States of the West had, in derogation of their right, given up their power of taxation in favor of the General Government, and the General Government as a great landed proprietor was just as much bound in equity to contribute to the support of the State government and to the building of roads and things of that kind as any other proprietor.

In every act of admission, certainly in the case of Florida and, I think, Alabama and all the land States of the South, it was stipulated that in consideration of a certain amount to be paid to the States, 5 per cent., I believe, of the net proceeds of the public lands, those States abandoned their right of taxation, and upon that ground it has stood in the nature of a compact between the States and the General Government ever since. The General Government has not attempted, in respect to its own public lands in the States, to claim the absolute right of exemption of those lands from taxation, but it put it on the ground of agreement with the States. The States in nearly every instance

agreed that they would not tax the public land in consideration of the payment of 5 per cent. of the net proceeds to the States when sold. In some instances it was stipulated that they should remain exempt for some time after the sale to the purchaser; but that was all matter of agreement. There is nothing in those laws which goes to show that the Government ever set up its absolute right of exemption from taxation with respect to anything which was not necessary to the carrying out of the functions of the Government. Of course, in the great case of McCulloch *vs.* The State of Maryland, the Supreme Court held that any agency which might be necessary to the Government in the discharge of its functions and powers no State could tax; but the principle of that decision never extended to public lands held by the United States as a landed proprietor, because those lands in no sense have ever been necessary to the performance of the powers or the functions of Government.

Mr. ALLISON. Mr. President, I have looked over this bill, and I do not see that this proviso is a practical one in connection with the remainder of the bill. There is no provision here that these Indians shall be permitted to take these lands in severalty unless they do as other people, pay for them. Now, I would ask the Senator from Nebraska if it is contemplated in this bill that Indians will become the purchasers of any portion of this tract of land? This bill contemplates the very reverse, because it provides that the fund received in payment of these lands shall go

directly into the Treasury of the United States, the interest only to be paid to the Indians.

Mr. SAUNDERS. In answer to the question propounded by the Senator from Iowa I will say that I do not think an acre of this land will be sold to the Indians, and hence I allowed this report to come in in this way through my own hands because of that fact. The other day we argued this same question on the bill to provide for the sale of the remainder of the Otoe reservation, and there it was decided by the Senate that they would leave this clause in, and on that account I was ready to leave it in here, although I did not think as a matter of fact a single acre of the land would go into the hands of Indians.

Mr. DAWES. The Senator will allow me. I think the Senator from Nebraska has overlooked the fact that underlying all this the treaty stipulations with these Indians is that any one of them can go on any part of all the present reservation, and is entitled to a patent, or what is equivalent to a patent; it is not called in the treaty a patent, but is equivalent in effect to a patent for 160 acres of land. Now, thirty-two at least of them have been here this winter representing that they are located on lands there and are entitled to a patent, and lest it may turn out that some of them are on this very land and are thus entitled, this provision is put in here.

Mr. ALLISON. Then a further provision ought to be inserted, excepting the rights of the Indians to the 50,000 acres, for the sale of which this bill provides,

because here is an absolute direction that these 50,000 acres shall be set apart by metes and bounds, and appraised and sold. If a portion of this land is already occupied by individual Indians under the treaty stipulation we should except and reserve so much of said lands as are so occupied.

Mr. DAWES. I do not mean to assert that any of them are upon this land; but it was thought wise to provide that if any Indian had located there he should be taken care of and not thrown out.

Mr. ALLISON. In many of the laws providing for the admission of States into the Union a provision is reserved that the United States shall have absolute control of Indian reservations. I see no such reservation in the act admitting the State of Nebraska into the Union. I think there is no such reservation. Therefore, it seems to me it is a very grave question whether or not we can, under the laws of the United States, provide that these persons shall not be taxed under the laws of the State of Nebraska, in case they buy these lands as other people buy them. So it appears to me, under this bill, it is not a practical question, although it may be a very important one in other cases where we propose to allow Indians to settle in severalty upon reservations now within the boundaries of States already in the Union.

Mr. MORGAN. Mr. President, I do not understand –

Mr. SAUNDERS. The Senator will allow me to send up a letter to be read, to settle one question, probably, that has been raised here.

Mr. MORGAN. I will yield if it does not come out of my time.

Mr. SAUNDERS. When the question was first brought before the Senate inquiry was made of the Interior Department to ascertain whether any Indians were living upon this land. This letter is an answer made by the agent at the Omaha agency to the Interior Department. It will settle that question.

The PRESIDENT *pro tempore*. The letter will be read.

The Acting Secretary read as follows:

UNITED STATES INDIAN SERVICE,
Winnebago Agency, Nebraska,
December 30, 1881.

To the honorable Commissioner of Indian Affairs, Washington, D. C.:

SIR: In answer to your letter of December 22, 1881, I respectfully state that there are no Indians living on the western portion of the Omaha reservation; that no land has been allotted to any of them so far as I can ascertain; and furthermore, that there are no improvements, such as houses, fencing, &c., upon the 50,000 acres of land alluded to in your letter. This land has a stream of water

running through it, called the Logan, hence it is known as the Logan Valley.

I am, respectfully, your obedient servant,

ARTHUR EDWARDS, *Agent*.

Mr. MORGAN. The part of section 4 which the Senator from Kansas desires to strike out, I understand relates exclusively to the Indians who may become purchasers of this land at public sale, and there is no provision in this bill to exempt from taxation so much of the land as may fall into the hands of other persons under the sale. It relates only to the Indians. Then the question is presented whether Congress, in making this disposal of land reserved to the Indians, have the right to annex to the disposition the condition which is provided for in this fourth section. Congress has uniformly exercised that privilege, both in the States and in the Territories. My eye happens to fall on a case that occurred in the State of Wisconsin, the Stockbridge-Munsee tribes of Indians, residing in the county of Shawana, in the State of Wisconsin. One of the sections of that law provides as follows:

> The homestead secured by virtue of the preceding section shall not be subject to any tax, levy, or sale; nor shall it be sold, conveyed, mortgaged, or in any manner encumbered, except upon the decree of the district court of the United States, as provided in the following section.

We have uniformly exercised this amount of control over lands belonging to tribes of Indians in whose favor reservations have been made, so as to protect the Indian against a thriftless disposition of his land after he shall acquire the right in severalty.

Mr. INGALLS. That question is not involved here.

Mr. MORGAN. It seems to me so, and it is the only question involved, because the Indian by purchasing the land which is now a part of the reservation, as he has the right to do as I understand the bill, acquires a title thereto subject to a condition that does not operate on the title of the white man, which is that it shall not be sold or encumbered for a period of twenty-five years, nor shall it be taxed by the State. We merely annex that condition to the disposal of this land which is yet within the jurisdiction and power of the United States Government. Surely, in conceding a title that does not now exist in favor of the State of Nebraska or in favor of the Indian reservee to him in severalty, we certainly have the right to annex this condition to him for the protection of the Indian; and it seems to me that if we yield this policy in this bill and all the others that are to follow it, this being a test question in the Senate, we shall expose the Indians to such an extent in respect to the land they will receive in severalty from the Government of the United States under the policy we are now trying to adopt, as that we had better not venture upon any such course. It is better to let them keep the lands in common than undertake to divide

them in severalty between the Indians at all. Beyond all question, if the policy now insisted on by the Senator from Kansas is adopted by the Senate and carried into effect in the future disposal of public lands for the benefit of the Indians within their reservations, the property of the Indians will be swept away from them before they have a sufficient knowledge of affairs to be able to protect themselves.

Mr. INGALLS. I move to commit the bill, for the purpose of enabling me to say a few words more on this question, because it involves really a question of great magnitude, and one that deserves a more elaborate discussion than it can receive under the rule under which we are now operating.

The act admitting the State of Nebraska provides that –

> No taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States.

Therefore, with the exception of all land belonging to the United States or purchased by the United States, the right of taxation does affirmatively inure to the people of Nebraska. I quote now from the section of the constitution of the State of Nebraska upon the subject of eminent domain, article 6, section 3:

> The people of the State, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the State.

Now, sir, the right to tax is the paramount right that arises from eminent domain. Unless there is the right to tax society cannot exist. If the Government can release one section of land from taxation [3030] by an act of Congress within the limits of the State of Nebraska it can attach a similar provision to all land that ever has been occupied as an Indian reservation or military reservation whenever it is offered for sale. There is no more right in the Government to exempt land that is sold, from an Indian reservation, from taxation because it is sold to an Indian than there is because it is sold to a white man. The only question is whether the Government releases its jurisdiction by giving a patent for a certain portion of this land to a private individual who is to live as a constituent member of that community, to receive the protection of its laws, to be allowed to travel over its roads and send his children to its schools, and at the same time to be entirely exempt from any impost upon the property on which he lives and to which this Government has no title whatever.

Mr. President, it appears to me that this is a very serious question, and when the Senator from Massachusetts states that this is an effort made to rob the Indians I should like him to state why. What robbery is there about imposing taxes like those which every other person pays upon the land that he owns and occupies? Is that robbery? What wrong is there about it? What rights has an Indian more than a white man to be exempt from bearing his burden of taxation upon the property that he owns and cultivates, and

from which he obtains his support? If he is entitled to receive that land, if he has sense enough to take a patent for it and occupy it, he has sense enough to pay the taxes on it, and if he has not he ought not to be allowed to possess it.

I withdraw the motion to commit.

Mr. MORGAN, I renew the motion, Mr. President. I do not understand that the landed property of the United States Government in Nebraska is liable to taxation under the law as it exists. In order to bring it within the right and the power of the State to tax it, we have to part with the title, not with the eminent domain, but part with the fee-simple title into the hands of some person. We may part with that title conditionally, we may make a provisional arrangement by which the patent is to issue which contains within its four corners the express provisions that these lands are not to be subject to taxation, are not to be subject to be alienated or encumbered within the period of twenty-five years. The question, therefore, is whether we have the right to make such a provisional or conditional arrangement in favor of an Indian who we think needs and deserves such protection. May we dispose of land otherwise than by granting the fee-simple title absolute and *eo instanti*? That is the question. I think that the owner of land can certainly dispose of it upon condition; and that is all that Congress proposes to do in this bill.

Mr. HOAR. It seems to me that this is a very interesting question indeed. I should like, without

having formed an opinion myself, to put a question to the Senator from Alabama. Does he claim that the United States might, for the purpose of enhancing the amount it should receive for its public lands, sell its public lands to white men only in any State? Suppose the United States should say in the State of Minnesota, "all the public lands we will sell on condition that they shall be exempt from taxes for the next twenty-five years," would that be lawful?

Mr. MORGAN. I understand that Congress has uniformly attached as a condition to the sale of all public lands that they should be exempt from taxation for a period of five years.

Mr. HOAR. I do not speak now of where they have reserved that right in the act admitting a State; but suppose they have not?

Mr. MORGAN. I do not understand that that provision of our laws has grown out of an agreement between the States and the Federal Government, but it is a power exercised in behalf of new settlers so that they may have a better opportunity to clear up their ground, build their houses, and establish themselves in living on the public lands.

Mr. ALLISON. I will call the attention of the Senator from Alabama to the act to enable the people of Nebraska to form a constitution and State government. I find in the third section of that act it is provided –

> That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States.

Mr. MORGAN. That is the doctrine to which I desire the Senate to adhere, that the public lands belong entirely to the Government of the United States, and are subject solely to their disposal, without contract or agreement with any one.

Mr. INGALLS. Not after they have sold them and given a patent.

Mr. MORGAN. If they sell them and put it in the patent that the grantee is to have a perfect title subject to taxation and with the right to encumber and the right to sell after a period of twenty-five years, I see no difficulty, either constitutional or in policy, in adopting a course of that kind.

Mr. INGALLS. Does the Senator hold the United States to have the right within the limits of the State of Kansas to give a patent to a white settler providing that the land shall not be taxed for twenty-five years by the State of Kansas?

Mr. MORGAN. I do not know whether we have a right to discriminate between classes of persons in legislation. That is a different question entirely. But I think that in providing for the sale of a reservation which we secured to the Indians by treaty, and in

which treaty it is said that they may hold their lands in severalty and receive patents, we have the right to provide that the patent shall inure to the party in full fee-simple title after the lapse of twenty-five years, and that there shall be an intermediate stage of the title which shall not be a complete fee-simple.

Mr. INGALLS. Take the case of this bill, where the land is confessedly land in an Indian reservation, and is to be sold to whites or Indians; does the Senator hold that the Government has the right to sell a portion of that land to a white man and put that condition in the patent that it shall not be taxed for twenty-five years?

Mr. MORGAN. I think the Government might have the right to do it. I would not undertake to commit myself; however, deliberately upon that proposition; but unquestionably where there is a right established by treaty in favor of the Indians under which provision a member of the tribe has the right to a location in severalty upon the identical land, when we come to execute the treaty –

The PRESIDENT *pro tempore*. The Senator's time is up.

Mr. MORGAN. Just allow me to –

Mr. INGALLS. I move to postpone the bill until to-morrow. That takes precedence, and the Senator from Alabama can take the floor on that motion.

The PRESIDENT *pro tempore*. If a Senator allows gentlemen to interrupt him, it must be taken

out of his time. If he would simply declare that he would not allow any interruption, he could say a good deal in five minutes.

Mr. INGALLS. I move to postpone the bill until to-morrow, and that takes precedence of the motion to commit.

Mr. MORGAN. A weakly man has not much chance among the giants of the Senate.

Mr. INGALLS. The Senator from Alabama can go on on that motion and speak.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Kansas, [Mr. INGALLS.]

Mr. MCMILLAN. I regard this as a very interesting and important question, although I incline to think that the position of the Senator from Kansas is incorrect. If I recollect the provisions of the homestead law passed by Congress, there is contained in that law a provision exempting a homestead from sale under an execution for any of the debts of the person who makes the homestead existing at the time the homestead right accrues. That provision I think involves the same principle that the Senator from Kansas supposes is involved in this question.

Mr. INGALLS. It would involve the same if the homestead law provided that it should not be liable for debts contracted after the title passed. That is exactly the difference.

Mr. McMILLAN. Why that distinction?

Mr. INGALLS. Because this provides that after the title has passed from the Government by a patent still the land shall be exempt from taxation for twenty-five years after that.

Mr. McMILLAN. The condition is imposed, however, at the time the Government parts with the title, and the exemption from levy and sale on execution continues after the party obtains his title.

Mr. HOAR. Does the Senator from Minnesota think that a private grantor could put such a condition, and would it operate in his grant, that the land granted should not be taxable for twenty-five years?

Mr. McMILLAN. No, sir.

Mr. HOAR. Then this cannot be supported on the ground suggested by the Senator from Alabama, that the United States, as owner, has a right to make such conditions on its grant as it sees fit. You must dismiss that consideration if that be true. Therefore it must come that the power, if at all, must arise from the legislative authority of the United States, from its authority as a Government. Now, where does the Senator from Minnesota find the authority of the national Government to impose a perpetual or limited exemption from taxation on any real estate which is owned by a person who in all other particulars is like every ordinary citizen of a State, merely because it once owned it itself?

Mr. McMILLAN. These are public lands.

Mr. HOAR. I put the question not to express an opinion, but to call out the view of the Senator.

Mr. McMILLAN. These are public lands owned by the Government of the United States. The Indians by reason of their relation to the Government occupy this particular land at this time as the wards of the Government, and not as citizens of the United States. The Government does not part with the title in fee-simple, but permits the Indians, retaining still their relation to the Government, not as citizens, but as the wards of the Government, to enter upon the occupancy of this land under a qualified title. The conditions of that title are determined by the Government when the title, whatever its character, is acquired. The title is still in the sovereignty of the Government of the United States; and it can impose conditions.

Mr. SAUNDERS. I think there is probably not a full understanding with some Senators as to exactly how this matter stands. The Indians have in their reserve some one hundred and fifty thousand acres of land. They are living on the eastern part of it, what is called the Missouri part, and enough of land is reserved besides what we are offering to sell here to give the usual amount to them and a little more than is provided in the other bills for dividing up lands in severalty. So far as I am concerned, I am in favor, when Indians want [3031] to take land and have it divided up and become citizens and take title to land to live upon, of giving them the advantages that are

proposed by this hill. But this land is not occupied by the Indians. It is occupied by nobody. It is vacant land, so far as anything in the way of improvements is concerned, and they are proposing to sell it, and sell it for their own benefit. The money goes into their own pockets or into the Treasury of the United States for their benefit. It is different, therefore, from what it would be if it were now land divided up in severalty or if it were giving title to Indians being citizens of the United States and being self-sustaining. This, as I say, is done for their benefit, and every dollar of the proceeds goes into their own fund. So, then, if they want to buy any of it they ought to be treated really just like any other persons, so far as the land is concerned. So far as the land reserved, that which is not to be sold, is concerned, these other questions will come up, and I think I shall be in favor then of putting this clause in a subsequent bill as to that, as I am in favor of doing it in the Territories, and I shall do it in the States if it can be legally and properly done.

I wanted to make this statement to the Senate to show that this land has nothing to do with the land on which the Indians are living and residing at the present time.

Mr. INGALLS. I understand the Senator has no objection to my amendment.

Mr. SAUNDERS. I have no objection to the amendment.

Mr. INGALLS. I think it ought to prevail.

Mr. SAUNDERS. But I went with the majority of the committee in presenting the bill, and therefore I wanted to make this statement to the Senate to show that I am not treating the committee unfairly by presenting the bill and reserving to myself the right to vote as I choose on such an amendment as this.

Mr. MORGAN. I understood the Senator from Kansas to say that this was a test question, and he intended to test the opinion of the Senate on it; otherwise I should not have interfered with the case, because it is a very small matter if one or two Indians should buy small tracts of land that that land should be exempt from taxation and incumbrance for a period of twenty-five years in the State of Nebraska; but treated as a test question it is a very important one. I understand that the power of Congress to do this thing is challenged and I understand also that the power of Congress has been expressly affirmed by the Supreme Court to do this thing, and upon the ground, if I understand the decision, that the Indian while he occupies or holds a tribal relation is not a citizen of the United States. We do not treat him and regard him as a citizen of the United States, and we have not extended our tax laws, perhaps, over the property of those persons who are within our domain but are not citizens of the country. In the case of the Kansas Indians it was decided by the present President of the Senate while he was on the Supreme Bench. I read the syllabus:

> The State of Kansas has no right to tax lands held in severalty by individual Indians

of the Shawnee, Miami, and Wea tribes under patents issued to them by virtue of the treaties made with those tribes respectively in 1854, and in pursuance of the provisions of the eleventh section of the act of March 3, 1859. (11 Statutes at Large, p. 431.)

Here is the eleventh section of the act referred to:

> That in all cases where by the terms of any Indian treaty in Kansas Territory said Indians are entitled to separate selections of land, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian or Indians, and their heirs, upon such conditions and limitation, and under such guards or restrictions as may be proscribed by said Secretary: *Provided*, That nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made by them in 1838, at Buffalo Creek.

Mr. INGALLS. The Senator will observe that the distinction between these two cases was that the contract with the Shawnee Indians was made while Kansas was a Territory, subject to the jurisdiction of the United States.

Mr. MORGAN. Afterward, when Kansas became a State, however, it undertook to exercise the power of taxation over these very lands, and the Supreme Court held that they were protected by that treaty, not because the terms of the treaty or the act of

Congress gave them lands in severalty and expressly prohibited that the lands should be taxed, but merely because they held their relations to the tribe, and not being citizens of the United States or of Kansas, their lands were not liable to taxation. I read the second branch of the syllabus to show that that is true:

> If the tribal organization of Indian bands is recognized by the political department of the national Government as existing; that is to say, if the national Government makes treaties with and has its Indian agent among them, paying annuities and dealing otherwise with "head men" in its behalf, the fact that the primitive habits and customs of the tribe when in a savage state have been largely broken into by their intercourse with the whites – in the midst of whom, by the advance of civilization, they have come to find themselves – does not authorize a State government to regard the tribal organization as gone, and the Indians as citizens of the State where they are, and subject to its laws.

And the court held in that case that the lands were not liable to taxation, although neither in the patent nor in the act of Congress was there any express exemption from taxation. I think that is a broad doctrine; it is a generous one, and one that we ought to uphold in respect to these Indians. They are under our guardianship and care, and we owe it to them as well as to ourselves that we should preserve them against such persons of our own race, or any other race, as may find occasion to maraud upon their

possessions and to deprive them of their lands, patented to them, before they have proper intelligence to take care of them.

Mr. DAWES. I do not know that I am in order in speaking at the present time.

The PRESIDENT *pro tempore*. The pending motion is to postpone until to-morrow. The Senator from Massachusetts has not spoken on that motion.

Mr. DAWES. I regret very much that the right of the United States to exempt land held in severalty by Indians under patent should be determined upon this bill, because the whole purpose of this proviso in the bill was to save such rights as possibly might exist to any individual Indian upon this territory growing out of this provision of the treaty made in 1866:

> The Omaha Indians being desirous of promoting settled habits of industry and enterprise among themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation –
>
> A part of which is this –
>
> shall be set apart for said purposes, and that out of the same there shall be assigned to

> each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upward, without family, not exceeding forty acres of land – to include in every case as far as practicable a reasonable proportion of timber. Six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the "Omaha reservation."

It then goes on to stipulate that the Indian may have a paper or certificate that shall give him and his descendants exclusive occupation of this land. It was supposed by the committee, upon the information derived from the Nebraska Senators, that there were no Indians upon this land, either in common or in severalty; but it was known to the committee that a portion of the Indians, thirty or forty of them, had gone upon the land somewhere and made a location which entitled them to these certificates which gave that exclusive occupation to them and their descendants.

Mr. SAUNDERS. The Senator is mistaken about their going on to this land.

Mr. DAWES. In order to perfectly protect their rights, although it was said and believed to be true by the committee that none of them were upon this land, yet, lest it might turn out that we were mistaken, it was provided that any Indian under these circumstances upon this land should be preserved in his rights by a patent. No one supposed, no one intended that if an Indian, like a white man, should go and purchase this land offered for sale and pay for it, such an Indian should have a patent exempting his land from taxation. No one intended any such thing as that. It was left to the Senator from Nebraska to draw an amendment that would cover and protect the possible rights which no one knew existed, and the Senator from Nebraska supposed he had done it.

And, therefore, while I am not disposed to yield the proposition of law suggested by the Senator from Kansas, who was present when this bill was formed and came out in its present shape, nevertheless it would be a great misfortune to the Indians elsewhere, though it might not affect these, if the Senate should decide that the United States had not authority to exempt land from taxation for twenty-five years which they have the power, while they hold themselves for the Indian, to keep from taxation or incumbrance any number of years. It was deemed by the committee, and has always been so considered by the United States, that the Government parts with but a portion of the title, holding a portion of that title within itself for the very purpose of taking care of the Indians, holding in some sense the title for the

purpose of the protection and the uses of the Indian, still holding enough to take care of him. That is the sense in which a patent exempts it from taxation.

I have no interest in this bill further than that the Senate shall not commit itself to a ground that will embarrass us in the future.

Mr. JONES, of Florida. Mr. President, I think it will be well for us to understand this question, for it is an important one. For one, I do not question the right of the Government of the United States by treaty to secure to a tribe of Indians the right to hold a tract of land independent of State authority; and when I was in the debate the other day my friend from Texas, [Mr. MAXEY,] not now in his seat, referred to the Cherokee decision in the case of the State of Georgia as affording an illustration against what I contended for then. But that decision only bore out what I said and what I propose to stand by now. In the case of the Cherokee Indians against Georgia, the Supreme Court held distinctively that they were an independent power in that State, and that the State of Georgia had no right to extend her laws over them, Marshall giving the opinion of the court. So in this case I do not question the right of the General Government to set apart a body of land for the Indians and to maintain them there as a distinct tribe, permitting them to hold their lands either in severalty or in common. But if it is the object of this bill to break up the tribal organization and to resolve those savage elements into the great body of the civilized community, then a very different principle must prevail.

They cannot be permitted [3032] to have the principle extended to them in a civilized state which was applicable to them in a barbarous state.

If it is the purpose of the General Government to throw this body of Indians among the civilized masses of Nebraska and to enable them to obtain titles to this land in severalty by patent, they must hold this land upon the same condition as other citizens of that State. If it proposes to keep them apart from the white community and maintain their tribal relation, it can permit them to hold their land in severalty or in common for that purpose, and they are not subject to the laws of Nebraska at all. But the moment it undertakes to reverse this order of things, and to throw these savages into a civilized state, to sell their land to the highest bidder, enabling the Indian to come forth, if he thinks proper, and pay money and take the title, he can only take the title upon the same conditions as a white purchaser, and he must submit to every law and authority in that State the same as a white citizen.

Mr. DAWES. I think the design of the Senator from Nebraska will be reached by an amendment, and I offer as a substitute for the proviso the following:

> *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

If that meets the views of the Senator from Nebraska I will move to strike out the proviso and insert it.

Mr. SAUNDERS. As far as I am concerned, I will accept the amendment.

Mr. DAWES. The phraseology of the bill is open to the construction that if any Indian purchases like a white man he can have a patent exempting him from taxation. It does not mean that.

The PRESIDENT *pro tempore*. The proposition of the Senator from Massachusetts [Mr. DAWES] will be read.

The ACTING SECRETARY. It is proposed to strike out the proviso in section 4, and in lieu thereof to insert:

> *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

Mr. DAWES. If by chance any Indian has gone under existing treaties upon any portion of this land that it is proposed to sell, and acquired under the treaty the right to have a certificate in severalty, it will not be affected by this, and when the land comes to be sold his right to one hundred and sixty acres must be exempt from the sale.

Mr. INGALLS. That is satisfactory.

Mr. CONGER. I should like to inquire whether, under that provision, Indians now having the right to

take any part of this land in severalty will continue to have that right?

Mr. DAWES. Not after the sale.

Mr. CONGER. I suppose that would defeat the object of the bill, for the part that is to be sold embraces the cream of all that reservation, the Logan Valley, and it is the part which any intelligent white man would select his right of severalty upon if he had it, and not among the bad lands bordering on the Missouri, which are left for the Indians. I am opposed to this continual attempt by legislation not only to take away the fairest and richest portions of the Indian reservations by such laws as this, but to still further diminish any right that the Indian may have by compelling him to take from the poor remainder in severalty the one hundred and sixty acres of land, and to the young man eighteen years old, who does not want a farm himself, a little pittance of forty acres, in lieu of his right to all this domain. I am very much surprised that the Senator from Massachusetts, so zealous for the rights of the Indian, permits this bill to pass without knowing, perhaps, as I happen to know, that the very desirable part of all this reservation, the part which white men want to-day, is this Logan Valley. I thought it was the most beautiful piece of land I had ever seen in the United States, as I passed through it a year ago.

It may be all for the best that this land be given to our white Nebraska friends, that piece after piece of the best farming land in that region be taken from

the Indians. I know that this bill says it is to be with the consent of the tribe; but the wards of the nation are protected even against their consent by the theory of the Government. They want to be near the river; in their ignorant condition as to farming and agriculture, they want to be where they can throw their lines into the muddy river and draw out the catfish. That is all they live upon, I am told. They will not select the land best adapted for agricultural purposes first; but intelligent men would select this beautiful Garden of Eden which is to be given to the white people from the part of the reservation now proposed to be sold.

I submit to the Senator from Nebraska whether in point of fact the very cream of that reservation is not to be sold under this bill, and whether the Indian's right to take land in severalty is not left to apply to the broken, unfertile portions of the reservation because of the timber there and the gullies there, and the river in which the Indians now fish?

Mr. SAUNDERS. The Senator says that the Indians are by the river for the purpose of catching cat-fish alone.

Mr. CONGER. There may be other kinds of fish; I do not know about that. I do not confine my remark to cat-fish; I enlarge it.

Mr. SAUNDERS. There are more successful farms at those two agencies worked by Indians than anywhere I know of in any part of the country. The members of the other House who were with me

visiting these Indians a few years ago found several of these Indians selling four or five hundred bushels of corn, and they have just as good lands left as these are. They want to sell this land, and the tribe have wanted to sell it for the last ten years. About ten years ago a bill was passed for the purpose of selling this same land but it was limited to $2.50 an acre, and they could not make sale of the land at that time at that price. Lands are more valuable now than then, and can be sold for more. So I have put in the same clause, that they shall be sold at not less than $2.50 an acre.

The PRESIDENT *pro tempore*. Does the Senator from Michigan yield?

Mr. CONGER. I am compelled to yield.

Mr. SAUNDERS. I thought the Senator was through.

Mr. CONGER. No; I had a word or two more to say, but I wanted to arouse the attention of my friend to this proposition. This bill proposes to give the Indians their rights, it is said. Why not make this bill as in other cases so as to give these Indians the right to make their selections after they are informed, after the nation has instructed its wards as it generally does by driving them away from their lands? Why not allow them to make their selection from the land along the Logan Valley, and then sell the residue of their reservation? That is the way we have done in other parts of the country; that is the way we did among the Indian tribes in Michigan. They first made

their selection; they were not confined to the paltry little strip of forty acres for each male eighteen years old. But this fertile land in Nebraska, that part of the reservation which is really valuable, must first be taken off, and then a little pittance of land, one hundred and sixty acres to one, forty acres to another, given, and I do not know but twenty to some of the Indians –

Mr. SAUNDERS. No.

Mr. CONGER. I am glad to hear that it is not down to twenty acres.

Mr. SAUNDERS. And it is not down as low as forty acres each for individuals.

Mr. CONGER. I understand the bill to say forty acres.

Mr. SAUNDERS. To be sold in tracts of forty acres, but the land that is to be left for the Indians after this is sold will be more than eighty acres to each individual Indian, great and small.

Mr. CONGER. I may have been mistaken in regard to that. It would be in keeping with the bill to confine it to forty acres, and I thought naturally the bill was consistent with itself.

Mr. DAWES. Mr. President, the Senator from Michigan seems to be surprised that I have given my assent –

The PRESIDENT *pro tempore*. The Senator from Massachusetts is not in order.

Mr. DAWES. I wanted to relieve the Senator from Michigan from his surprise; but I can do it to-morrow.

Mr. ALLISON. Let us vote.

Mr. DAWES. I want to state to the Senate the ground on which I gave my assent to this bill. I have not had the benefit of personal knowledge of the ground as the Senator from Michigan, nor have I had any special claim –

The PRESIDENT *pro tempore*. The Senator from Massachusetts is speaking on his own amendment, the Chair is informed, and therefore in order.

Mr. DAWES. Last summer I saw the representatives of this tribe; and I heard them myself state that, while they were unwilling to take upon their ground any other Indians, they were very anxious to sell a portion of their real estate and obtain the money, so that the interest of the money they could use for the improvement of the residue of their property. They had more land than they could occupy, as I heard them state myself.

When this bill came in I was troubled lest the sale of 50,000 acres would leave the reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation, as much as, if all the Indians should take in severalty, would give each one a farm and have some left for such increase of numbers as might probably be expected in the next

twenty-five years; that there was no apprehension on the part of the Department; they were satisfied. He said that it would be for the interest of these Indians to have a portion of their lands converted into money the use of which they could have.

The PRESIDENT *pro tempore*. The hour of two o'clock has arrived, and the Chair will lay before the Senate –

Mr. DAWES. I wish the Senate might dispose of this bill. If there be no objection, I ask the Senate to continue the consideration of it.

Mr. INGALLS. Regular order.

The PRESIDENT *pro tempore*. The regular order is called for, and the Chair lays before the Senate the unfinished business.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

CONGRESSIONAL RECORD – HOUSE.

JULY 22,

* * *

[6383] SALE OF OMAHA RESERVATION.

Mr. HASKELL. I move that the Committee of the Whole House on the state of the Union be discharged from the further consideration of the bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes, reported from the Committee on Indian Affairs with a substitute.

The motion was agreed to.

The substitute is as follows:

That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State [6384] of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April 19, 1880, approved by the Acting Secretary of the Interior July 27, 1880. The said lands shall be appraised, in tracts of forty acres each by three competent commissioners, one of whom shall be selected by the

Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that all unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation each *bona fide* settler occupying any portion of said lands and having made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and the appraised value of said lands, as provided for in section 1 of this act: *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say: one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years from said date, with interest at the rate of five per cent. per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or

payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than $2.50 per acre: *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the 1st day of June, 1885, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States and shall bear interest at the rate of 5 per cent. per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement,

and so forth, proof thereof shall be received by the local land-office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April 19, 1880, approved by the Acting Secretary of the Interior July 27, 1880, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian

to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by

patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said

Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of $5 for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian

lands shall pay $2, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Mr. SCALES. I ask the gentleman from Kansas not to press that bill in the absence of a quorum, for I shall be compelled to ask for a division on it.

Mr. HASKELL. I am left then no alternative but to withdraw it.

Mr. SCALES. I do not mean to say I shall be hostile to the bill when I come to look into it.

Mr. HASKELL. I do not wish to press it unduly.

Mr. VALENTINE. Let it be printed in the RECORD.

Mr. HASKELL. Yes, that will be done. I withdraw the bill for the present.

INCREASE OF COMMISSIONER'S SALARY.

Mr. BUCK. I move that the Committee of the Whole on the state of the Union be discharged from the further consideration of the bill (H. R. No. 5010) to increase the salary of the Commissioner of Indian Affairs, and that it be taken up for present consideration.

The motion was agreed to.

The bill was read, as follows:

Be it enacted, &c., That the Commissioner of Indian Affairs shall be entitled to a salary of $5,000 a year.

The bill was ordered to be engrossed and read a third time; and being engrossed, it was accordingly read the third time, and passed.

Mr. BUCK moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

INDIAN TRADERS.

Mr. HASKELL. I now call up from the Speaker's table the bill (S. No. 114) to amend section 2133 of the Revised Statutes, in relation to Indian traders.

The bill was taken up and read a first and second time. The bill was read, as follows:

Be it enacted, &c., That section 2133 of the Revised Statutes of the United States be, and the same is hereby, amended so that it shall read:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall

moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the five civilized tribes, residing in said Indian country, and belonging to the Union agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said five civilized tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior."

The bill was ordered to a third reading; and it was accordingly read the third time, and passed.

Mr. HASKELL moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

COMMITTEE CLERK.

Mr. HASKELL. I am instructed by the committee to report the following resolution for adoption:

Resolved, That the clerkship of the Committee on Indian Affairs of this House be, and is hereby, declared an annual clerkship, with compensation fixed at $2,000 per annum. And the Clerk of this House is directed to pay the clerk of said committee

such compensation for the fiscal year 1883 from the contingent fund.

Mr. SCALES. Let that go to the Committee on Accounts.

Mr. HASKELL. This resolution has already been before the Committee on Accounts and referred there unanimously by the action of our committee. But by reason of the failure to secure a quorum of the committee, a trouble with which many of our committees are now afflicted, it has never been reported. I think it would not be objected to by the Committee on Accounts. The Committee on Agriculture and the Committee on Public Lands, both of them smaller in the amount of business they have before them than the Committee on Indian Affairs, have been given annual clerks.

Our committee is very anxious during the recess of Congress, in view of the important legislation pending and which is now before that committee, to leave that room in the custody of a clerk during the vacation, so that these important papers will not be overhauled and disturbed. This is a matter which personally I did not press upon the committee. They were unanimously of opinion, however, that it should be done. Our committee has now some five hundred bills before it, and there is not a day that we have a meeting that attorneys and others urging various interests, rights of way and the possession of large tracts of land, are not anxious to get access to the papers to aid their investigation. As I have said, the

committee is anxious to prevent the overhauling and overturning of its rooms during the recess. For that reason we desire to leave this room in the custody of a clerk. There are six hundred bills pending before the committee. I am so informed by my colleague –

The SPEAKER *pro tempore*. If the point of order is insisted upon the Chair will have to rule that this must go to the Committee on Accounts.

* * *

CONGRESSIONAL RECORD – HOUSE.

JULY 26, 1882

* * *

[6537] SALE OF OMAHA INDIAN RESERVATION.

Mr. HASKELL. I now call up and ask to have passed, with the amendment reported by the Committee on Indian Affairs, the bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes. The amendment is in the form of a substitute.

Mr. VALENTINE. The bill was read on last Saturday, and was published in the proceedings of that day.

Mr. SCALES. Let it be read again. A great many members are here now who were not here on Saturday.

The Clerk read the proposed substitute, as follows:

Strike out all after the enacting clause and insert the following:

"That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April 19, 1880, approved by the Acting Secretary of the Interior July 27, 1880. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior."

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that all unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation each *bona fide* settler occupying any portion of said lands, and haying made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States or who has declared his intention to become

such shall be entitled to purchase, for cash, through the United States public-land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and the appraised value of said lands as provided for in section 1 of this act: *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say: one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years from said date, with interest at the rate of 5 per cent. per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall, under the provisions of this act, settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess. but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for loss than $2.50 per acre: *And provided further*, That all land in township twenty-four, range seven east,

remaining unallotted on the 1st day of June, 1885, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3: That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent. per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, &c., proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and pre-exemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad

Company, under the agreement of April 19, 1880, approved by the Acting Secretary of the Interior July 27, 1880, in severalty to the Indians of said tribe in quantity as follows: to each head of a family, one-quarter of a section; to each single person over eighteen years of age one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who, being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by

the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

[6538] SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged a said trust, and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

Sec. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha, tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act touching patents to allottees therein mentioned. But

such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents when issued shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at $5 for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay $2, the same to be retained by the receiver and register of the land-office at Neligh, Nebraska, as their fees for services rendered.

Mr. SCALES. I hope that we shall have some explanation of this bill.

Mr. HOLMAN. I rise to a question of order: that this bill makes an appropriation of money, and must receive its first consideration in the Committee of the Whole. I call attention to the first section of the substitute on page 5, which provides for the appointment of

commissioners, and also to section 9, which is in these words:

> That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of $5 for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

The bill seems clearly to involve an appropriation of money; but I shall be glad to reserve the question as to the right to consider the bill in the House until the gentleman from Kansas [Mr. HASKELL] and the gentleman from North Carolina [Mr. SCALES] have been heard. Upon explanation the bill may appear to be so clearly right that it ought to be passed without further delay. But it is manifestly a very important measure. It involves a principle to which I am irrevocably hostile – speculation in the public lands. I do not care what this Government may have to pay to the Indian tribes for their lands, I wish those lands when acquired to be held by the Government for the benefit of its landless people. I regret to see any bill brought in here which tends to furnish facilities for the transfer of these lands to the hands of speculators. Still I wish to reserve the question of order until gentlemen have been heard in support of the bill.

The SPEAKER *pro tempore*. The point of order is reserved.

Mr. HASKELL. Mr. Speaker, I am very glad to have the opportunity to say a word or two in behalf of this bill. As it stands before the House every provision referring to the rights of the Indians, the disposition of their lands, their location, &c., has been drafted on their behalf by their representatives and at their suggestion absolutely.

Mr. Speaker, if there is one tribe in the United States that has earnestly desired a severalty selection law and that they might receive from the United States patents and an absolute title to their lands, these Omaha Indians are pre-eminently such a tribe. Not a single Indian nation out of the dozens that have applied to us has so unanimously asked this character of legislation as have these Omaha Indians. They are a tribe living without annuities, farming their own lands, making their own living, managing their own affairs. The money that is paid to them on behalf of the Government is paid merely to support an agency school, with the expenses of the surrounding agency. These Indians themselves are intelligent, capable, hard working, and upright. It has been stated with a great deal of truth that they are the most advanced and enlightened of the Indian tribes west of the Missouri River.

Now, these Indians, numbering about 1,200, have a reservation of 150,000 acres. They have asked that a portion of this reservation west of the Sioux City and Nebraska Railroad may be sold at an appraised value in order that a national fund may be created upon which they may draw. They have a great deal

more land than they need, and if this bill passes a portion of their land will be sold at an appraisement. One of the appraisers is to be appointed by the Indians and one by the Interior Department, and in no case is the appraisement to be less than $2.50 an acre. This is the protection of the Indians in the sale. Before any land is sold they are at liberty to make their individual selections of one hundred and sixty acres to every head of a family, eighty acres to every widow, and forty to every child. These severalty selections are to be held in trust by the Government for the sole use of the Indians for twenty-five years, at the end of which time patents are to be issued in fee-simple. All the lands not allotted are to be patented under the broad seal of the United States to the tribe in common, so as to give them an absolute, indefeasible title to about 100,000 acres. These are the features of the bill as it respects the Indians. It is their earnest desire and prayer, as appears by their petitions appended to the report which I have made to the House, that a measure of this kind be adopted.

Now, as to the other side of the case – the disposition of the lands to white settlers. This portion of the bill I drew myself with special care, having some knowledge of the disposition of public lands, so that not an acre of this land shall go to any white person by purchase, unless he be the actual occupant of it, living upon it, improving it, making it his home. In no case can any one man secure more than one hundred and sixty acres. Thus all speculation is cut off, and the 49,000 acres contemplated to be sold are opened

up to the actual *bona fide* settler. With these guards to prevent the disposition of these lands to speculators, and securing absolutely the right and title of the Indians, with an abundance of land allowed to them over and above their allotments, and patented to them *in solido*, we present to the House this bill as a measure absolutely in the interest of these Indians, with every possible loophole carefully guarded, and a bill which the Indians earnestly desire to see passed.

Mr. HOLMAN. May I inquire what portion is proposed to be sold?

Mr. HASKELL. The western portion or all that lying west of the Sioux City and Nebraska Railroad, which runs through their reservation.

Mr. HOLMAN. How many acres?

Mr. HASKELL. About 45,000. The total reservation is about 150,000 acres. It will leave some 100,000 acres to these Indians. They are to have their severalty allotments patented after twenty-five years, during which time they are to be held in trust by the Government for these Indians. The remaining portion of their lands, not taken by severalty allotments, is to be patented to them *in solido*. It is the perfection of Indian legislation as recommended by Secretary Kirkwood, and the present Secretary and by all the Indian officials who have been connected with the business. It was the intention of the Committee on Indian Affairs, and I believe this bill does embody every valuable suggestion which comes from the

Indian Office in reference to the handling of Indian lands and similar questions.

Mr. HOLMAN. The selection of the tracts by the Indians is to be a voluntary act of their own and not of the commissioners.

Mr. HASKELL. They make their own selections in their own behalf and for their own children. I wish to say, further, the right of severalty selection is specifically laid down in their treaty. They asked for it themselves, and the whole scheme of severalty allotment is stipulated in their treaty. They have taken out certificates of allotment, which are provided for in the bill. We wish to go further, and protect every Indian selection so as to secure to him an absolutely indefeasible title.

Mr. WELLBORN. Can those severalty selections be made anywhere in the reservation?

Mr. HASKELL. Yes, sir; anywhere within the reservation.

Mr. WELLBORN. Before the sale takes place

Mr. HASKELL. The treaty stipulation in reference to severalty is not to be affected by this.

Mr. SCALES. The gentleman is mistaken as to that.

Mr. TOWNSHEND, of Illinois. I ask the gentleman from Kansas what proportional part of the lands are asked to be sold?

Mr. HASKELL. About one-third.

Mr. TOWNSHEND, of Illinois. How much land per capita is there now belonging to these two tribes of Indians?

Mr. HASKELL. As much as 1,200 will go into 150,000.

Mr. TOWNSHEND, of Illinois. That would be about one hundred and twenty-two acres each. I think there are about 2,400 Indians.

Mr. HASKELL. No; there are between 1,100 and 1,200.

Mr. SCALES. In the Winnebago tribe and this together?

Mr. VALENTINE. The Winnebago tribe has nothing to do with this reservation. They live in my county and I know about them.

Mr. TOWNSHEND, of Illinois. Is it not a fact that the Indian agent has reported to the Indian Department that these lands lying west of the Sioux City and Nebraska Railroad are very valuable?

Mr. HASKELL. They are. The tract sought to be sold is one of the best in the country.

Mr. TOWNSHEND, of Illinois. If that is the most valuable part of their lands why do you seek to sell it. Is it prudent for men owning property to sell the most valuable portion of it?

Mr. HASKELL. We let the Indians take their severalty allotments in the most valuable part. The fact is, the timber, which is the great desideratum in Western lands, lies where they are now located. Many of them have good farms and fields well fenced, with [6539] cattle, &c., and they wish to take their severalty allotments where they now have their homes. Any Indian, however, who wishes to take his piece of land to the west of the railroad can do so.

Mr. SCALES. My friend does not mean to say after this land is sold there can be any allotment?

Mr. HASKELL. Before any is sold that right of allotment is specially guaranteed, and they can make their selections wherever they choose.

Mr. VALENTINE. I desire to say there is now a law authorizing the Secretary of the Interior to sell 50,000 acres of that land. It embraces all the land mentioned in this bill and some other land in addition; and that land may be sold indiscriminately to any persons. It may be sold to persons not expecting to become actual settlers.

After this railroad was built through there the Indians then asked that he sell no land under the law as it now exists, and made their petitions for a bill of this character, the one which is now pending before the House, and which was framed in accordance with their wishes.

Speaking as to whether it is the best agricultural lands or not, I will state in reply to gentlemen that it

is just such lands west of the road that are offered for sale as are east of the road for a considerable distance; but, as stated by the gentleman from Kansas, the agency buildings are over nearer the Missouri River among the timber where most of the Indians have their homes and have made their selections. These Indians I know very well, and they are anxious to sell this portion of the reserve and have allotments made to them in severalty of the remainder. It is at their request, as I have stated, that the bill was drawn, and it is in my judgment the best bill I have ever seen brought into the House for the sale of Indian lands.

Mr. HASKELL. I desire to take the floor again in order to make a statement, for when I referred before to the total amount of the land belonging to this reserve I was not sure that I was correct. The Commissioner, as I understand it, says that there will be remaining after this sale, when the allotments are provided for, 143,000 acres, so that instead of the entire reserve being 150,000 acres, after this sale and these allotments are made there still remain 143,000 acres.

Mr. VALENTINE. I think it is considerably over 100,000; the report will show, however.

Mr. NEAL. I would like to ask the gentleman from Kansas a question.

Mr. HASKELL. Certainly.

Mr. NEAL. As I understand it the minimum price fixed for this land is $2.50 an acre.

Mr. HASKELL. Yes, sir; and it cannot be appraised for less than that. It must be appraised by the joint action of the Interior Department and the Indians themselves, and the settlers pay the appraised value for the land, every dollar of which goes to the Indians to be invested for their interest.

Mr. NEAL. Now, still further, let me ask why you make the minimum price $2.50?

Mr. HASKELL. Let me state first that I find, according to the report of the Commissioner, there will be over 100,000 acres of this land remaining –

Mr. NEAL. The question I was going to ask the gentleman is whether or not that land is not very rapidly appreciating in value, so that it will be worth three or four or five times as much in a few years from now as it is now worth?

Mr. VALENTINE. Not while it remains in the possession of the Indians.

Mr. NEAL. It has appreciated though, in late years.

Mr. HASKELL. I will answer the gentleman. As a general proposition covering the wild lands of the West, unless it happens that a man makes a selection where a town subsequently springs up, no man in the world ever had wild lands to appreciate in value on his hands to such an extent that it could pay 5 or 6

per cent interest; never in the world. And if I owned this Omaha reservation myself today I would prefer to have it sold under the terms of such a bill as this at an appraised value, as fixed in this bill, and would be sure to get an interest on that money, at Government rates, far in excess of any possible increase of the value of the lands while they remained in my possession.

I think that is a proposition in which every man who has cognizance of the value of these western lands will bear me out. It is only those lands which are improved by having a town spring up upon them, or by having railroads passing through them, where any considerable increase in value takes place; and if these lands remain in the possession of the Indians who now occupy them there is no possible chance of any such increase of value. So if we put the minimum at $2.50 an acre, and then appropriate every dollar received from the sale of them for the benefit of these Indians, after they have received their allotments, their interests will be greatly increased rather than by permitting them to retain the land in their own possession. They see the wisdom of this themselves and urge its adoption.

Mr. NEAL. The answer of the gentleman, so far as I am concerned, is perfectly satisfactory.

Mr. VALENTINE. I desire, Mr. Speaker, to say a word as to the amount of lands that will remain after the allotment and sale not exceeding 50,000 acres lying west of the railroad, as provided by this bill, and

I will read here from the report of the Committee on Indian Affairs, page 2, where it is shown:

> There then remained of the unallotted lands (outside of the lands to which the provisions of the present bill authorizing the sale of not exceeding 50,000 acres extend) an area of 100,526.66 acres.

Mr. SCALES. Mr. Speaker, I beg the attention of the House for a few moments while I make some statements I think they should be in possession of before acting upon a bill of this importance. When I objected to the consideration of this bill on Saturday last I did not then know that I would upon examination be opposed to it. Upon going to my room, however, I examined into the effect of it, and became well satisfied that whatever the object of the Committee on Indian Affairs was, or whatever might be the object the gentleman from Nebraska had in view, this in effect if passed by this House would be nothing more nor less than a swindle upon the Indians; and I say this, sir, without meaning any personal offense to anybody who is interested on the other side.

Now, so far as that part of the bill is concerned which proposes to allot the lands in severalty, I am in hearty accord with it. I believe those provisions of the bill are the best I have ever seen. I believe that they ought to be passed and hope they will pass, but I do ask this House, in the interest of the Indians to whom these lands now belong, before you make this allotment, not to say that you will sell the very best part of the lands that belong to them, and that you will

sell only that part which is fit for farming purposes. That is all I ask. And to sustain my position on that point I have only to read to this House what I have read for myself. Taking up the report of the Commissioner of Indian Affairs on last Saturday I find a report from the agent who has just gone to that agency, and I ask the House to bear with me while I read it.

Now, mind you, the first clause is that 40,000 acres of the western part of this land are to be sold. Why sell it? Why sell it now upon the eve of dividing that land among the Indians and allowing a commission to give to them that which is best for them and for those who come after them? Why not, I appeal to members, allot first and sell afterward, if sell you must?

Gentlemen say it is in the interest of Indians. I apprehend it will appear here from the facts in this case it is in the interest of the white people of Nebraska; and my sole object – I have none other in view – is to protect the Indians, who in this particular, the disposal of their lands, have been swindled by permission of the Government almost, I blush to say, without exception from its foundation.

Much has been said by sensationalists of the treatment of the Indians by this Government – much unjustly and much that is well founded. The Government is criminally indulgent and generous in feeding and clothing and schooling these Indians year after year, without forcing them to work or their

children to attend schools that they may become self sustaining. The money is wasted and no improvement in the Indian. But the special ground of complaint is in the disposal of their lands. Here they are always swindled, and by permission of Government, and we see step by step, acre by acre, they are driven, under the authority of treaties too, until they have been swept away from the Territories, even to the very shores of the Pacific. A few here and there can be found in the Territories, but they are fast disappearing and will eventually be pushed to the Pacific. Why, sir, is this? It is because these Territories have been settled up; the white man has come upon the stage; the white man is blinded by greed and avarice; the white man must have the benefit of these fertile lands. And lo, the poor Indian who has westward taken his way, must go still farther westward to find a home in a less favored clime, with less fertile lands.

What I ask is, that where they have lands, while we have the power, we shall keep them in possession of these lands until they are allotted in severalty, until each individual has his home protected by the laws of this great Government, and then you can sell what they do not require. The Government feeds and clothes them annually. The great object in view is to make them self-supporting and stop this heavy drain. How can this be done if the best lands are taken and they left to barren rocks and steep and rugged cliffs to learn a remunerative system of agriculture?

Now, let me read to the House this report. I ask the House to look at the two pictures. This is the report of the agent, who says:

> This large body of land is better adapted to the raising of stock than for farming purposes, it being much broken and mountainous, especially that part of it lying on the Missouri River.

Now, the other picture:

> The western part of both reservations and through which the Logan runs is more level and well adapted to farming purposes, and it is said to be equal in fertility to any land in the State of Nebraska.

That is the part they want to sell. The eastern part is broken; it is mountainous; it is unfitted to farming purposes, and that is the part we are told here by the Indian Committee in the interest of the Indian that the Indian ought to keep. But hear further what he says; and I ask the special attention of the House to this:

> In traveling over the reservation the other day, especially that part lying on the Logan, I could not help being impressed with the untold wealth that lay before [6540] are; pasturage sufficient for thousands and thousands of head of stock; a fine stream of water running at my feet, and hardly a tree in sight; grass from two to four feet in height; and all this treasure in a month or two,

> instead of being gathered into barns, to be consumed by the annual prairie fire.

Mr. HASKELL. Will the gentleman allow me to interrupt him?

Mr. SCALES. In a moment.

> There is no end to grass anywhere except on the border of the Missouri. The reservation is one grand prairie – one great stock-raising country, where if a white man had a title –

Mr. Speaker, here I think is the milk in the cocoanut –

> The reservation is one grand prairie – one great stock-raising country, where if a white man had a title to three hundred acres of land he could not help becoming wealthy in a very few years.

That, Mr. Speaker, is the land described by your own agent, that you are asked to sell in the interest of the Indian, and to reserve for them the bleak and barren mountains on the Missouri River, where this agent says no grass grows.

Mr. HASKELL. Now, let me state that letter is written by the agent with reference to the old bill of 50,000 acres east of the railroad. It does not apply to the present bill, and of that beautiful Logan Valley the gentleman refers to – I leave it to the map; I state it on my honor – from one-half to three-fourths of that beautiful Logan Valley, instead of being sold, is left in

the reserve. And that was the special care of the committee to see that that beautiful piece of land, a large portion of it, all the Indians would want, was reserved to them, and it is reserved to them by this bill.

Mr. SCALES. Let us see how that is by the report of this same agent. I gather my information from him. I take it the agent knew what he was talking about. He is on the ground and has the knowledge. He says:

> A large number of the Omaha tribe are thinking very strongly of disposing of 50,000 acres of this western portion of their reservation –

The part he had just described of that reservation –

> though while in Washington and when asked by the honorable Secretary of the Interior whether they would sell 20,000 acres of their reservation to the Poncas, they replied that they would not, but might be induced to dispose of it to the white settlers.

Mr. VALENTINE. Exactly; that is right.

Mr. SCALES. Induced to sell to white settlers! What does that mean? Shall I tell this House? Shall I tell the country what that means? Shall I call the attention of this House to transactions occurring every day in negotiating treaties, and which ought to call the flush of shame to the brow of every man who had anything to do with it?

Not more than from four to six years ago a treaty was made with the Ute Indians in regard to their reservation, and to induce the agreement the commissioners provided a pound of striped candy for each buck Indian in order to be certain of his assent. I do not refer to the last Ute agreement or to that commission. But I believe it is done more or less in all cases. What does assent mean? Will you tell me that you do not know? You do know what it means. In these transactions assent is obtained too often by whisky, striped candy, a few dollars, and such gewgaws and trifles as catch the eye of the savage, without an equivalent, and you all from the West know it; my Kansas friend knows that is what it means.

Talk about getting their assent! No, sir; there is no assent in it, and if there was, if you did secure their assent, let me appeal to you in the name of that justice which has been so long postponed, delayed, and that good faith this Government should observe – let me ask you to stop to-day this system of getting assent. Give the Indians the best lands in their reservation and put them upon it. This agent, fortunately, says these 40,000 acres west are the very lands to be sold, and coming as it does, it settles absolutely the locality.

If you are going to do justice to these Indians, send out your commission and let that commission select lands for the Indians which are suitable for farming purposes. If they are willing to give up those lands for money, or whisky, or striped candy, or earrings, or gewgaws, or even for a small price in money,

ought we to allow them to do it? In the name of God, I say no; in the name of justice, I say no; in the name of the down-trodden Indian, I say no.

Mr. WELLBORN. I desire to ask the gentleman from North Carolina [Mr. SCALES] a question.

Mr. SCALES. Very well.

Mr. WELLBORN. I ask the gentleman, not in the way of controversy, but simply for information in view of the reference made by the gentleman to the sale of the Ute lands for candy some four years ago, does the gentleman think that this bill does not adequately provide for the sale of this land at its real value?

Mr. SCALES. I am not objecting so much to that now, though in this respect it is not sufficiently guarded; the minimum price is too small. If my friend had listened to me he would have found that the object of my remarks was not at all as against that portion of the bill giving the lands in severalty to the Indians, but merely to that part which provided for the sale of these lands. My idea is this: if you want this allotment, appoint your commissioners and give the Indians the best land, and give it before you sell any off.

Mr. TOWNSHEND, of Illinois. Why sell any of it? Why not allow them to have it all.

Mr. SCALES. Yes, why sell any of it?

Mr. HASKELL. I would inquire how much time there is remaining of my hour?

The SPEAKER, *pro tempore*, (Mr. BURROWS, of Michigan.) The gentleman has thirty-five minutes remaining.

Mr. SCALES. This is an important subject, and I hope it will not be hurried over. There are in this reservation 180,000 acres of land. There are in the Omaha tribe 1,121 individuals. If none of this land is sold it will give 160 acres per capita to the members of this tribe – not an acre too much if there should be increase and prosperity. Sell it, and you do it for the white men; sell it, and you open the door for speculation and great profits.

Now, what do I propose to do? Am I objecting to this allotment? No, sir. I think the time has come, and I am glad to know that the American House of Representatives in the last Congress recognized the fact, when these Indians must be treated under law. I am glad to see that the time has come when you must give them their lands in severalty, leaving the title in the Government, as this bill does, until they show that they can take care of it and will not be swindled out of it.

I am glad the time has come when these Indians will be forced by the Government to work, when they will be forced by the Government to attend the schools, and when all will be controlled by the law of this great country. Why, sir, fifty years ago Mr. Calhoun, standing in the old Hall of the House of Representatives, said that there could be no civilization, there could be no improvement, there could be

no great moral advancement of the Indian tribes until they were under law. Yet from that day to this there has been no law extended over them except the savage law of their own savage tribes.

I am in favor of this allotment; I am in favor of law over the Indians. I believe the time has come when this question will be solved. I heartily concur with my friend from Kansas, [Mr. HASKELL;] we have always been hand in hand on this subject, and I am with him to-day.

But excuse me; when the Committee on Indian Affairs goes so far, or when the Secretary of the Interior goes so far, or when the Commissioner of Indian Affairs goes so far in allotting these lands as to take from the Indians the best lands they have, according to all estimates, the only lands fitted for agricultural purposes, for that pursuit in which you have boasted that your civilization of the Indian has been most perfect heretofore – excuse me if I cannot go to that extent. I want to keep these lands for the Indians without regard to the profit they may be to the white man should he obtain possession of them.

I sympathize with those gentlemen who live in Nebraska. If I resided there, I doubt not I would desire that these Indians who seem to be a sort of wall in the path of the country's progress should be out of the way. But, Mr. Speaker, they must go somewhere; and the Government has given them this land. Do not let the Government, in the name of all that is just, take it away from them under the guise of

having obtained their free consent. This is the most shameful fraud of all. No, no; do not say that. If you adopt such a measure, say frankly that you take their lands by force for the white man, and leave the question in that shape as the result of force without consent.

Mr. HASKELL. Mr. Speaker, how much time have I remaining?

The SPEAKER *pro tempore.* Twenty-five minutes.

Mr. HASKELL. I propose to yield to the gentleman from Nebraska [Mr. VALENTINE] fifteen minutes, or so much time as he may desire.

Mr. HOLMAN. I supposed that the gentleman from North Carolina [Mr. SCALES] was speaking in his own right, and was entitled to an hour.

Mr. SCALES. Yes, sir; I spoke in my own right.

Mr. HASKELL. I do not know when I surrendered the floor. I have been yielding to several gentlemen.

Mr. SCALES. I wish to reserve the remainder of my hour in order to reply. How much time did I occupy?

The SPEAKER *pro tempore.* Twenty minutes.

Mr. VALENTINE. Mr. Speaker, I will not detain the House long; but I cannot remain silent and allow the remarks of the gentleman from North Carolina

[Mr. SCALES] to go unanswered, and, as to a portion of them, undenied. Probably he is not personally responsible for some of the assertions which he made, as he has relied upon the statements of an agent. One portion of the report which he read speaks of the mountainous regions of Nebraska and then speaks of this reservation as one grand prairie.

Mr. SCALES. That is what the officer making the report said.

Mr. VALENTINE. I know he said it; at least, that is what the gentleman read, and I presume he read it correctly.

Mr. SCALES. I spoke of the western part as a prairie. The eastern part is mountainous, as I understand.

Mr. VALENTINE. The eastern part of that reservation is just like the counties of Burke and Washington that lie south of it; and those counties are considered to be two of the best agricultural counties in Nebraska. It is true they are not quite as level as –

Mr. SCALES. How would the gentleman like to have this bill confined in its operation to the eastern part of the reservation?

[6541] Mr. VALENTINE. I would prefer it if I were going upon the land to farm.

Mr. SCALES. If any portion of the reservation is to be sold, I will give my consent to the sale of that part, if it would be satisfactory to the gentleman.

Mr. VALENTINE. I have no doubt the gentleman would consent; but it is not his consent we are asking. It is the consent of the Indians that we desire; and the Indians wish to retain the eastern part. You cannot find a single Indian of that tribe who will consent to the sale of the eastern part of the reservation. A delegation from the tribe, headed by Joe Laflesche, so stated before the committee. You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

These are not the wild untutored Indians that the gentleman from North Carolina talks about; they are bright and intelligent; they are farmers who earn their own living by what they raise upon their farms as do the white people. They have good houses. Their families are neat and clean. They are educated, and are educating their children.

I do not wish to speak further except to say that there are no mountains in Nebraska. There is no land in the eastern part of Nebraska that is not susceptible of agricultural cultivation. I send up to the desk to be read a speech of Joe Laflesche, one of these Indians, delivered before the committee. It is very short; and I want it to go alongside of the speech of the gentleman from North Carolina.

The Clerk read as follows:

REMARKS OF JOSEPH LAFLESCHE.

FRIENDS: I wish to speak to you of some of our troubles. First, I will tell you of some things in the past. I was born in this country, in Nebraska, and I have always lived among the Indians. There was a time when I used to look only at the Indians and think they were the only people. The Indians must have been long in this country before the white man came here. I do not know how the Indians got their seed, but they had corn and squash and beans when I was young. In the spring they would take their seed and farm their one or two acres. There were no idlers, all worked in the spring. Those who had no hoes worked with pieces of sticks. When they got their seed in they went on the hunt. They had nothing to worry them; all they thought of was their little garden they had left behind. In the middle of the summer they came back with the skins for their tent cloths, the meat for their food, and the skins for their clothing. They made use of all animals. When they got home they gathered their

corn, dried it, buried a part of it, and taking enough to serve them, started out on the winter hunt to get furs. Then it was I used to see white men, those who were going around buying furs.

Sometimes for two or three years I would not see any white men. At that time the country was empty, only animals were to be seen. Then after a while the white men came, just as the blackbirds do, and spread over the country. Some settled down, others scattered over the land. The Indians never thought that any such thing could ever be. It matters not where one looks now, one sees white people. These things I have been speaking about are in the past, and are all gone. We Indians see you now, and want to take our steps your way. We turn ourselves toward you that you may help us. It seems as though the Government pushes us back. It makes us think that the Government regards us as unfit to be as white men. The white man looks into the future and sees what is good. That is what the Indian is doing. He looks into the future and sees his only chance is to become as the white man. When a person lives in a place a long time he loves the place. We love our lands and want titles for them.

When one has anything he likes to feel it is his own and belongs to no one else; so we want titles; then we can leave our land to our children. You know, and so do we, that some of us will not live very long; we will soon be

gone into the other world. We ask for titles for our children's sakes. For some years we have been trying to get titles, but we have never heard from the Government. A little while ago I heard what the President said in his message, and it seemed as though he was giving me a cup of cold water when I was very thirsty. We are not strong enough to help ourselves in this matter, so we ask you to help us. In the past we only lived on the animals. We see that it is from the ground that you get all that you possess.

The reason you do not look upon us as men is because we have not law, because we are not citizens. We are strangers in the land where we were born. We want the law, that we may be regarded as men. When we are in trouble we want to have courts to appeal to. The law will teach wrong-doers. It will prevent trouble, as well as punish those who commit offenses. We know that in asking for titles we are asking for that which will bring responsibility. We are ready to accept it, and to strive to fulfill its requirements. It seems as though in the past the Government had not listened to the words of the Indians. We know our own needs, and now we speak to you directly.

Mr. HASKELL. I would like to move the previous question and have it ordered now, so that this bill may be pending in the morning; and then I will move to adjourn.

Mr. HOLMAN. I wish to move an amendment.

Mr. SCALES. Will the arrangement which the gentleman from Kansas [Mr. HASKELL] suggests reserve my time, which I wish to use in reply?

Mr. HASKELL. I want the gentleman to yield his time, and I will yield mine, so that the debate may terminate now.

Mr. SCALES. I do not know but I may agree to that.

Mr. HASKELL. I wish to save as much of the time of the committee as I can. I do not want to consume more time in debate upon this bill. Let us vote it up or down. If the gentleman from Indiana desires to offer an amendment, I will yield to him for that purpose.

Mr. HOLMAN. While I do not waive the point of order pending before the Chair, I present the following amendment.

The Clerk read as follows:

> Add to the eighth section of the amendment the following words:
>
> "*Provided further*, That no part of said land shall be sold until the allotments shall have been made to the said Indians under the fifth section of this act. And said Indians, or any part of them, may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east or west of said right of

way mentioned in the first section of this act."

Mr. HASKELL. I now demand the previous question on the bill and amendment, and ask that the amendment may be printed in the RECORD, and then let it go over.

Mr. HOLMAN. Gentlemen are anxious on this side there shall be no haste in this matter. We reserve the point of order, and I think, subject to the point of order, it might be agreed the previous question should be regarded as pending.

Mr. HASKELL. I do not want the point of order allowed to run along to a future time. I do not care whether the bill is passed or not, but I do want to conclude action on the bill so we may get up some other business and dispose of it. That is my sole desire.

Is the point, Mr. Speaker, that the bill shall be considered in the Committee of the Whole House on the state of the Union?

Mr. HOLMAN. Yes; that is the point of order, that, under the rules, it must have its first consideration in the Committee of the Whole House on the state of the Union.

Mr. HASKELL. Why, that is set aside by the order of the House fixing this time for the consideration of Indian business. We are authorized to consider in the House any Indian business which we may choose to call up. The House will bear me witness

that I have not choked off debate or amendment, but have allowed full and fair consideration of every measure.

Mr. HOLMAN. The gentleman has been very fair.

Mr. HASKELL. I wish to save time, so we may have opportunity to call up other bills. I have promised to call up an important bill, brought to my notice by gentlemen on the other side of the House, and I wish to keep my word.

Mr. SCALES. I cannot consent to withdraw the point of order. I feel it to be my duty to insist upon it.

Mr. HASKELL. Very well; let us have a decision on the point of order.

Mr. SCALES. It is understood when the previous question is ordered I am to have my time.

Mr. HASKELL. I do not want to take up any more time. Let us have a vote on the bill, and vote it up or vote it down.

Mr. SCALES. I might want to say something.

Mr. HASKELL. If we do not debate it on this side there will be nothing to reply to.

Mr. SCALES. I insist on the point of order.

The SPEAKER. Will the gentleman from Indiana indicate what provision of the bill is subject to the point of order?

Mr. HOLMAN. The ninth section provides for the payment of the expenses of this commission out of the public Treasury.

Mr. HASKELL. No; all of the expenses are to be paid out of the proceeds of the sale, out of Indian money, and not out of the public Treasury.

Mr. HOLMAN. I did not so read it, but I may be mistaken.

The SPEAKER *pro tempore.* The rule provides as follows:

> 3. All motions or propositions involving a tax or charge upon the people; all proceedings touching appropriations of money, or bills making appropriations of money or property, or requiring such appropriation to be made, or authorizing payments out of appropriations already made, or releasing any liability to the United States for money or property, shall be first considered in a Committee of the Whole, and a point of order under this rule shall be good at any time before the consideration of a bill has commenced.

Will the gentleman from Indiana point out what provision of the bill brings it within that rule?

Mr. HOLMAN. The ninth section of the bill. It does not provide for the payment of money out of any specific fund. It does not provide the compensation of these commissioners shall be paid out of the fund coming from the sale of these lands. In the absence of such provision that it shall be paid out of some

specific fund of course it will have to come out of the public Treasury. I concede if the money is to be paid out of the Indian fund the case will be quite different.

Mr. HASKELL. In reply to the gentleman, I refer him to section 3, that the proceeds of the sale, after paying the expenses incident to and necessary to carry out the provisions of this act, &c., as the Secretary of the Interior may deem necessary, may be placed to the credit of the Indians. It provides for the payment of every expense out of the money arising from the sale. It is not an appropriation of money out of the Treasury or a tax upon the people.

Mr. ROBINSON, of Massachusetts. This discussion is quite immaterial, because in the line of the ruling of the Chair it is not competent to insist on the point of order. The House having made a special order of this business for to-day, the Speaker has held the point of order that a bill must first go to the Committee of the Whole House cannot be made or insisted on. He ruled that in reference [6542] to the District of Columbia business, and the gentleman from Indiana will recollect that, because we had a long discussion over it. The Chair has held that in such cases, where the House by a special order assigns a certain class of business for a specified day, that it avoids this point of order.

Mr. SCALES. A word there, Mr. Speaker, in response to the gentleman from Massachusetts. Can it be the fact that it has been decided in this House, or so held by the Speaker, that when the House

determines to make a special order assigning certain business for a specified time, it has determined thereby to give up all its rights, and the rights of its individual members to make points of order upon the bills which may be presented coming within the rule?

Mr. ROBINSON, of Massachusetts. That, I say, was the ruling, after a long discussion, as my friend from Indiana will recollect.

Mr. SCALES. A ruling at this session of Congress?

Mr. ROBINSON, of Massachusetts. Yes, sir the question arose with reference to some business reported from tile Committee on the District of Columbia, and it will be remembered that the Speaker reinforced his decision by stating that it was the substance of former rulings upon the same subject. For myself I may be permitted to say that I seriously question the wisdom of such rulings.

Mr. HASKELL. This imposes no tax upon the people; it takes no money out of the Treasury. If there was even a point of order to be made against it on that ground it has already been overruled by the Speaker.

Mr. SCALES. In all frankness I do not think, on examination of the bill, that the point of order is good; and since I have examined this section of the bill to which attention has been called by the gentleman from Kansas, I withdraw it.

The SPEAKER *pro tempore*. The Chair would have been compelled to overrule the point of order.

Mr. HOLMAN. This third clause of the bill provides that the money is to be paid out of the Indian funds, and in that case of course the point of order would not be good.

Mr. HASKELL. I now ask the previous question upon the bill. The previous question was ordered.

Mr. HASKELL moved to reconsider the vote by which the previous question was ordered; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

* * *

CONGRESSIONAL RECORD – HOUSE.

JULY 27, 1882

* * *

[6571] ORDER OF BUSINESS.

Mr. VAN HORN. Mr. Speaker, I desire to ask –

The SPEAKER. The regular order has been called for.

Mr. VAN HORN. I think the gentleman from Pennsylvania [Mr. RANDALL] will not insist on the regular order.

Mr. RANDALL. He does not often change.

The SPEAKER. The regular order is called for.

Mr. CALKINS. I desire to ask unanimous consent to pass a bill. If I can get the ear of the House, I think there will be no objection.

The SPEAKER. The regular order is called for, and the hour for the consideration of business under the new rule will begin –

Mr. HASKELL. I desire to call the attention of the Speaker to the fact that when the House adjourned on Saturday the previous question had been ordered upon a pending bill and amendment.

The SPEAKER. The attention of the Chair having been called to the matter, it will state that the bill (S. No. 1255) relating to the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska was under consideration yesterday, and the previous question was ordered on the bill and pending amendment. That will come up the first thing this morning as unfinished business.

SALE OF OMAHA INDIAN RESERVATION.

The House accordingly resumed the consideration of the bill (S. No. 1255) to provide for the sale of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

The pending amendment was to add to the eighth section the following:

> *Provided further*, That no part of said land shall be sold until the allotments shall have been made to the said Indians under the fifth section of this act. And said Indians, or any part of them, may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east or west of said right of way mentioned in the first section of this act.

Mr. SCALES. Is it in order to offer an amendment now?

The SPEAKER. It is not; the previous question is operating.

Mr. SCALES. I ask the gentleman from Kansas [Mr. HASKELL] to allow me to offer an amendment; I will not discuss it.

Mr. HOLMAN. As the amendment was read the word "all" does not appear. It should read "until all the allotments shall have been made."

Mr. VALENTINE. I desire to state to the gentleman from Indiana [Mr. HOLMAN] that there could be no objection to his amendment if he would leave out the first sentence. Under the present treaty, which this bill states shall not be affected by this act, the Indians have the right to go upon any portion of that reservation to make their selection; and if the gentleman thinks there is any ambiguity in the bill,

there is no objection to placing that in specifically. But that part of his amendment which provides that "no part of the reservation shall be sold until all the allotments shall have been made" is clearly erroneous, and will defeat the very desire of the Indians themselves, because the children, the younger members of the tribe, will not be able to make their selections for a great many years. That portion of his amendment would defeat the very object of the bill and the wishes of the Indians themselves who have asked for this legislation.

Mr. HASKELL. Why not modify the amendment so that no sales shall be made until the Indians now of proper age shall have made their selections?

Mr. VALENTINE. They do not care about making selections over on that side of the road at all.

The SPEAKER. The Chair will state that this is not debatable, the previous question operating. The question is upon agreeing to the amendment which has been read.

Mr. HOLMAN. I ask unanimous consent that there may be allowed some time to come to an understanding about this matter, which is of some moment to this Indian tribe.

The gentleman from Nebraska [Mr. VALENTINE] proposes to omit from the amendment the provision that "no part of said lands shall be sold until all the allotments shall have been made to the said Indians under the fifth section of this act," and leave the rest

of the amendment to stand. Now, I am free to say that rather than have the whole amendment rejected (for I think the last clause is of some value) I should prefer to accede to his proposition. I do not, however, understand this matter so well as my friend from North Carolina, [Mr. SCALES.]

Mr. VALENTINE. Then I desire to offer an amendment to the amendment.

The SPEAKER. It is not in order.

Mr. VALENTINE. If the gentleman from Indiana will not accept an amendment to his amendment, I ask that his amendment be voted down entirely, because if adopted it would defeat the very object of the bill.

Mr. HOLMAN. I hope that by unanimous consent the gentleman from Nebraska may be permitted to offer his amendment to strike out the first clause of my amendment, and have the sense of the House taken upon it.

Mr. VALENTINE. The amendment would be a very wise one with that provision struck out.

Mr. HASKELL. Let the gentleman from Indiana modify the amendment by striking out the first sentence, because with that sentence retained these allotments would continue for twenty years, and consequently the object of the bill would be defeated. If the first clause of the amendment be struck out I will support it.

Mr. VALENTINE. So will I.

Mr. HASKELL. Otherwise I must ask the House to vote it down.

Mr. HOLMAN. I am anxious that the last clause of the amendment should be adopted.

Mr. HASKELL. Will not the gentleman modify his amendment as suggested?

Mr. SCALES. I hope the gentleman from Indiana will not withdraw the first part.

Mr. HOLMAN. I hope that by unanimous consent the gentleman from Nebraska may be permitted to offer an amendment to strike out the first clause of my amendment.

The SPEAKER. If the gentleman desires to modify his amendment the Chair will submit it.

Mr. HOLMAN. No; I desire that permission be granted to amend.

The SPEAKER. The gentleman from Nebraska has not made that motion.

Mr. VALENTINE. I will, if I am permitted to do so.

Mr. HOLMAN. I will withdraw the first clause of the amendment.

The SPEAKER. If there be no objection, the gentleman will be allowed to modify his amendment.

Mr. SCALES. I object.

Mr. VALENTINE. Then let us have a vote on the amendment.

The question being taken on the amendment of Mr. Holman, there were – ayes 15, noes 49.

Mr. HOLMAN. I do not wish to raise the question of a quorum; but I ask my friend from North Carolina to consent that my amendment be modified. He can see that the House is inclined to vote the whole thing down if the first clause be retained.

[6572] The SPEAKER. Is there objection to the modification of the amendment of the gentleman from Indiana as indicated?

Mr. VALENTINE. Let the Clerk read the part proposed to be struck out.

The Clerk read as follows:

> No part of said land shall be sold until all the allotments shall have been made to the said Indians under the fifth section of this act; and.

Mr. HASKELL. With that modification I have no objection to the amendment.

The SPEAKER. Is there objection to allowing the amendment to be thus modified? The Chair hears none.

Mr. SCALES. I will not further object. As it is the amendment of the gentleman from Indiana, he may modify it in his own way.

The question being put on the amendment of Mr. HOLMAN as modified, it was agreed to.

The question was then taken on agreeing to the substitute as amended, and it was agreed to.

The bill as amended was ordered to a third reading; and was accordingly read the third time.

The question being taken on the passage of the bill, there were – ayes 68, noes 24.

Mr. SCALES. No quorum.

Tellers were ordered; and Mr. HASKELL and Mr. SCALES were appointed.

Mr. SCALES. I ask for the yeas and nays. That will dispense with the call for tellers.

The SPEAKER. If the gentleman withdraws the point, the Chair will put the question on ordering the yeas and nays.

The question being taken on ordering the yeas and nays, there were – ayes 20, noes 87; less than one-fifth voting in the affirmative. So the yeas and nays were not ordered.

Mr. SCALES. I think I was misunderstood about this matter. I said that if I could have the unanimous

consent of the House I would be willing to take the vote by yeas and nays instead of calling for tellers.

The SPEAKER. The gentleman did not submit that statement to the Chair.

Mr. SCALES. Then I call for tellers now.

Tellers were ordered; and Mr. HASKELL and Mr. SCALES were appointed.

Mr. SCALES. I understand the vote now to be taken by tellers is upon ordering the yeas and nays.

Mr. HASKELL and others. No; upon the passage of the bill.

Mr. VALENTINE. Mr. Speaker, I rise to a parliamentary inquiry. What is this vote upon?

The SPEAKER. Upon the passage of the bill.

Mr. HOLMAN. Oh, no.

The SPEAKER. The gentleman's statement was, as the record will show, that he demanded tellers.

Mr. HOLMAN. On the yeas and nays.

Mr. SCALES. I expressly said so in so many words.

The SPEAKER. There is no use of having any controversy about it; the Reporter's notes will show what took place.

Mr. SCALES. Several gentlemen around me were making the suggestion to me.

Mr. MANNING. I was making the suggestion to the gentleman from North Carolina, and understood him to say that.

Mr. VALENTINE. What do the reporters say.

The SPEAKER. The Chair did not so understand it.

Mr. COX, of New York. The Speaker will take the intention of the member.

The SPEAKER. If the gentleman from North Carolina states he intended to do it, of course that will be sufficient.

Mr. SCALES. I not only intended to do it but my opinion is I did do it.

The SPEAKER. The Chair does not controvert the gentleman's statement, but it did not so understand him. There need be no difficulty about the matter at all. The Chair understands the notes of the Reporter do not show he called for tellers on the yeas and nays, but the Chair will submit that question to the House now if gentlemen will resume their seats.

Mr. HASKELL. Let us take a direct vote by yeas and nays on the passage of the bill, which will be the easiest way out of this difficulty.

The SPEAKER. The Chair will submit that question to the House on ordering the yeas and nays on the passage of the bill.

The yeas and nays were ordered.

The question was taken; and it was decided in the affirmative – yeas 105, nays 65, not voting 119; as follows:

YEAS – 105.

Aldrich,
Anderson,
Bayne,
Berry,
Bliss,
Browne,
Buckner,
Burrows,
Julius C.
Campbell,
Candler,
Cannon,
Carpenter,
Cassidy,
Caswell,
Chace,
Crapo,
Culberson,
Cullen,
Cutts,
Davis,
George R.
Dawes,
Deering,
Do Motte,
Dezendorf,
Dingley,
Dowd,
Dunn,
Farwell,
Sewell S.
Fisher,
Ford,
Fulkerson,
George,
Godshalk,
Gunter,
Harmer,
Harris,
Benj. W.
Haseltine,
Haskell,
Hatch,
Hepburn,
Hill,
Hiscock,
Horr,
Houk,
Jones,
George W.
Kasson,
Kelley,
Ketcham,
Lewis,
Lynch,
McClure,
McCoid,
McKinley,
Mills,
Moore,
Morey,
Moulton,
Norcross,
Oates,
O'Neill,
Page,
Parker,
Peelle,
Peirce,
Pettibone,
Pound,
Prescott,
Ranney,
Reagan,
Reed,
Rice,
Theron M.
Rich,
Richardson,
D. P.
Robeson,
Robinson,
Geo. D.
Robinson,
Jas. S.
Rosecrans,
Russell,
Ryan,
Shallenberger,
Sherwin,
Shultz,
Skinner,
Smith,
Dietrich C.
Smith,
J. Hyatt
Spaulding,
Spooner,
Steele,
Strait,
Taylor,
Townsend,
Amos
Tyler,
Updegraff,
J. T.
Upson,
Valentine,
Van Horn,
Van Voorhis,
Wadsworth,
Wait,
Ward,
Washburn,
Watson,
Wellborn,
White,
Williams,
Thomas.

NAYS – 65.

Atherton,
Barbour,
Briggs,
Buchanan,
Cabell,
Caldwell,
Carlisle,
Chapman,
Clements,
Colorick,
Converse,
Cox
Samuel S.
Cox,
William R.
Covington,
Cravens,
Dibrell,
Dugro,
Ellis,
Ermentrout,
Errett,
Evins,
Forney,
Garrison,
Hardenbergh,
Henderson,
Hewitt,
Abram S.
Hoge,
Holman,
House,
Hubbell,
Kenna,
Klotz,
Leedom,
Le Fevre,
Manning,
Martin,
Matson,
McKenzie,
McMillin,
Morrison,
Muldrow,
Murch,
Mutchler,
Payson,
Phelps,
Robertson,
Ross,
Scales,
Simonton
Singleton,
Otho R.
Smith,
A. Herr
Speer,
Springer,
Stockslager,
Thompson,
P. B.
Townshend,
R. W.
Turner,
Henry G.
Turner,
Oscar
Vance,
Warner,
Webber,
West,
Whitthorne
Willis,
Wise,
George D.

NOT VOTING – 110.

Aiken,
Armfield,
Atkins,
Barr,
Beach,
Belford,
Belmont,
Beltzhoover,
Bingham,
Bisbee,
Black,
Blackburn,
Davis,
Lowndes H.
Deuster,
Dunnell,
Dwight,
Farwell,
Chas. B.
Flower,
Frost,
Geddes,
Gibson,
Grout,
Jones,
Phineas
Jorgensen,
Joyce,
King,
Knott,
Lacey,
Ladd,
Latham,
Lindsey,
Lord,
Lowe,
Ritchie,
Robinson,
Wm. E.
Scoville,
Scranton,
Shackelford,
Singleton,
Jas. W.
Smalls,
Sparks,
Stephens,
Stone,

Blanchard,
Bland,
Blount,
Bowman,
Bragg,
Brewer,
Brumm,
Buck,
Burrows,
Jos. H,
Butterworth,
Calkins,
Camp,
Clardy,
Clark,
Cobb,
Cook,
Cornell,
Crowley,
Curtin,
Darrall,
Davidson,
Guenther,
Hall,
Hammond,
John
Hammond,
N. J.
Hardy,
Harris,
Henry S.
Hazelton,
Heilman,
Herbert,
Herndon
Hewitt, G. W.
Hoblitzell,
Hooker,
Hubbs,
Humphrey,
Hutchins,
Jacobs,
Jadwin,
Jones,
James K.
Mackey,
Marsh,
Mason,
McCook,
McLane,
Miles,
Miller,
Money,
Morse,
Mosgrove,
Neal,
Nolan,
Orth,
Pacheco,
Paul,
Phister,
Randall,
Ray,
Rice, John B.
Rice,
William W.
Richardson,
Jno. S.
Talbott,
Thomas,
Thompson,
Wm. G.
Tucker,
Updegraff,
Thos.
Urner,
Van Aernam,
Walker,
Williams,
Chas. G.
Willits,
Wilson,
Wise,
Morgan R.
Wood,
Benjamin
Wood,
Walter A.
Young.

So the bill was passed.

During the roll-call the following pairs were announced from the Clerk's desk:

Mr. AIKEN with Mr. VAN AERNAM.

Mr. LOWE with Mr. HERNDON.

Mr. JONES, of New Jersey, with Mr. HERBERT.

Mr. HEILMAN with Mr. BLAND.

Mr. McCoid with Mr. Clark.

Mr. Lindsey with Mr. Ladd.

Mr. Humphrey with Mr. Bragg.

Mr. Hall with Mr. Wise of Pennsylvania.

Mr. Walker with Mr. Wilson.

Mr. Hubbs with Mr. Shackelford.

Mr. Barr with Mr. Davidson.

Mr. Stone with Mr. Hewitt of Alabama.

Mr. Dunnell with Mr. Hardy.

Mr. Young with Mr. Clardy.

Mr. Bowman with Mr. Sparks.

Mr. Grout with Mr. Talbott.

Mr. Thompson, of Iowa, with Mr. Cook.

Mr. Scranton with Mr. Beach.

Mr. Cornell with Mr. Latham.

Mr. Curtin with Mr. Thomas.

Mr. Hammond, of New York, with Mr. Phister.

Mr. Geddes with Mr. Ritchie.

Mr. Orth with Mr. Cobb.

Mr. Guenther with Mr. Deuster.

Mr. McLane with Mr. Urner.

Mr. MASON with Mr. MONEY.

Mr. FARWELL, of Illinois, with Mr. SCALES.

Mr. DWIGHT with Mr. STEPHENS.

Mr. MILES with Mr. SINGLETON of Illinois.

Mr. MCCOOK with Mr. RANDALL.

Mr. UPDEGRAFF, of Iowa, with Mr. RICHARDSON, of South Carolina.

Mr. WILLITS with Mr. HAMMOND of Georgia.

Mr. RANDALL. I notice, Mr. Speaker, I am announced as paired [6573] with Mr. MCCOOK, of New York. While I am up on my feet I will state that the RECORD of Tuesday does not show the announcement of my pair with that gentleman during Tuesday, which existed as it had been announced on Monday. There were one or two important votes on Tuesday, and I wish to make the announcement that I did not vote because I was paired. It was the understanding when either one of us returned we should vote, and that is the reason I have voted. But in order there may be no misunderstanding, and rather than have any construction made against the gentleman from New York, I will withdraw my vote and let the pair stand between him and myself.

On motion of Mr. VALENTINE, by unanimous consent, the reading of the names was dispensed with.

The vote was then announced as above recorded.

Mr. HASKELL moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

CONGRESSIONAL RECORD – SENATE.

JULY 29, 1882

[6628] The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

OMAHA INDIAN RESERVATION.

Mr. SAUNDERS. I ask that Senate bill No. 1255, received from the House of Representatives, be laid before the Senate.

The PRESIDENT *pro tempore* laid before the Senate the amendment of the House of Representatives to the bill (S. No. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes, which was to strike out all after the enacting clause and insert a substitute therefor.

Mr. SAUNDERS. Without reading the amendment, I wish to move that the Senate do not concur in the amendment of the House; and to expedite business I will move that a committee of conference be appointed.

Mr. HAWLEY. I am not sure that that motion ought to be agreed to by any manner of means. I am inclined to think the House has improved the bill. I

suppose it is a matter of mere form to agree to a conference committee.

Mr. DAWES. Without doubt the House improved the bill, but there seems to be a necessity for some verbal alteration.

Mr. HALE. If the bill can go to a conference at once I will yield for that purpose.

Mr. HAWLEY. I refrain from objecting partly on the intimation of the Senator from Massachusetts that the bill is about right.

The motion was agreed to; and the President *pro tempore* being authorized to appoint the committee, Mr. SAUNDERS, Mr. DAWES, and Mr. PENDLETON were appointed the conferees on the part of the Senate.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

47TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES { REPORT No. 1530.

SALE OF A PART OF OMAHA INDIAN RESERVATION IN NEBRASKA.

JULY 1, 1882. – Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. HASKELL, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany bill S. 1255.]

The Committee on Indian Affairs, to whom was referred the bill (S. 1255) to provide for the sale of a part of the reservation of the Omaha tribe of Indians, in the State of Nebraska, and for other purposes, have had the same under careful consideration, and beg leave to submit the accompanying substitute therefor, and report thereon:

By the terms of this bill, which is offered as a substitute for Senate bill No. 1255, it is provided that, with the consent of the Omaha tribe of Indians, all that part of the Omaha Indian Reservation in the State of Nebraska, lying west of the line of the Sioux

City and Nebraska Rail-way, may be surveyed, appraised, and sold to actual *bona fide* settlers, who may hereafter, under the provisions of this bill, settle upon said lands, the proceeds of such sale being for the use and benefit of said Omaha tribe of Indians, leaving for the use and occupancy of the Omaha Indians about 140,000 acres of land. There will be sold under the terms of this bill about 45,000 acres of land, to be appraised at not less than $2.50 per acre.

The bill also provides for the allotment in severalty to each member of the tribe of a sufficient quantity of land to give each family all that they can cultivate profitably, and secures to the tribe, by patent in common, all the land not thus allotted to individuals of the tribe, the sale of which is not provided for in this bill.

Your committee believe that they have incorporated in the bill all the suggestions that have been made by the Commissioners of the General Land Office and of Indian Affairs, and that the interests of the Indians have been carefully guarded in strict accordance with their wishes and their treaties with the United States. There is hereto appended as part of this report an extract from the letter of the Commissioner of Indian Affairs to the Senate Committee on Indian Affairs, of date March 20, 1882, and also Senate Mis. Doc. No. 31, being a memorial from the Omaha Indians concerning the subject matter of this bill.

Your committee are of the opinion that great good will result to the Indians in the securing of title to their lands, as provided for in this substitute, and that the Senate bill as thus amended should pass.

* * * * * * *

"By the treaty with the Omahas of 1855 (14 Stats. 667), provision is made for the issuance of certificates to members of the tribe; but it may be questionable, and it is questioned, whether such certificates have the force and effect of a patent, and convey the fee of the land. The question may be a more practical one when the time shall arrive at which those holding lands under such certificates shall be entitled to and wish to sell their lands"; and this office presumes that the suggestion of the Secretary that " the bill should also provide that for all allotments of lands already made to individual Indians, and for all that may be made, *patents* should issue the same as to white persons," &c., was intended to apply especially to the lands embraced within that part of the reservation to which the proposition to sell does not extend, and where *only* allotments for which said certificates were issued have been selected.

* * * * * * *

I would recommend a provision for the issuance of *patents* in lieu of the *certificates* provided for in the fourth article of the treaty of March 6, 1865 (11 Stats., 668), which shall expressly state that the lands covered by such patents shall not be subject to

alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction.

In reply to the inquiry of the committee as to whether, if so much of the reservation is sold as provided, the remainder will be adequate for the present and prospective wants of the Indians located thereon, I will state that there will be remaining an area of 143,225 acres, more than will be required for present or future wants.

The population of the tribe, as per last report of the agent, is 1,121. By the treaty of March 6, 1865 (14 Stat., 667), it is provided that there shall be assigned to each head of a family not to exceed 160 acres, and to each male person eighteen years of age and upwards, without family, not exceeding 40 acres, and that 640 acres shall be set apart for agency purposes.

Under the foregoing provisions 316 allotments were made (in 1870) requiring 45,182.47 acres. Subsequently 19 of these allotments were canceled as falling within lands sold to the Winnebagoes under act of 1874 (15 Stats., p. 170), leaving an area of allotted lands 42,698.42 acres. There then remained of unallotted lands (outside of the lands of which the provisions of the present bill authorizing the sale

of not exceeding 50,000 acres extend) an area of 100,526.66 acres.

Most of the Indians entitled have had their lands assigned to them, and it is clear, therefore, that the lands covered by the proposition to sell can be spared without endangering the future well-being of the Indians. * * *

MEMORIAL OF THE MEMBERS OF THE OMAHA TRIBE OF INDIANS, FOR A GRANT OF LAND IN SEVERALTY.

To the Senate of the United States:

We, the undersigned, members of the Omaha tribe of Indians, have taken out certificates of allotment of land, or entered upon claims within the limits of the Omaha reserve. We have worked upon our respective lands from three to ten years; each farm has from five to fifty acres under cultivation; many of us have built houses on these lands, and all have endeavored to make permanent homes for ourselves and our children.

We therefore petition your honorable body to grant to each one a clear and full title to the land on which he has worked.

We earnestly pray that this petition may receive your favorable consideration, for we now labor with discouragement of heart, knowing that our farms are not our own, and that any day we may be forced to leave the lands on which we have worked. We desire

to live and work on these farms where we have made homes, that our children may advance in the life we have adopted. To this end, and that we may go forward with hope and confidence in a better future for our tribe, we ask of you titles to our lands.

Respectfully submitted:

1. Kah-a-num-ba (Two Crows) x Lewis Morris, 18 acres.
2. Do-uba-moni x Harrison McCauley, 16 acres.
3. Segro-nunga x George Gran (police), 21 acres.
4. Ta-oh-ka-hah x Arthur Ramsey (police), 32 acres.
5. Wajepa x Ezra Freemont, 55 acres.
6. x Joseph Merrick, 16 acres.
7. Pawnee-mumph-zhe x Iordan Stabler (police), 18 acres.
8. Pah-bee-sonta x Johnathan Rush, 15 acres.
9. Ma-etbing-ge x No Knife, 18 acres.
10. Wah-na-zha-hinga x Little Soldier, 15 acres.
11. Waa-zhe-umta x Alvin Cox, 16 acres.
12. Me-hah-ta x Henry Morris, 29 acres.
13. Ma-he-wa-the x Richard Robinson (police), 18 acres.
14. Wa-loo-te ta x Samuel Irving, 8 acres.
15. Mumta Do-uta x Levi John Webster, 16½ acres.
16. Wa-ho-sha-go x James Springer, 12 acres.
17. Um-pa-tim-ga x Big Elk, 14 acres.

18. Ma-wah-dah-ne x Henry Cline, 28 acres.
19. Frederick Merrick, 13½ acres.
20. x Matthew Tyndal (captain police), 27 acres.
21. Tah-ha-zhinga x Badger, 15 acres.
22. Noah Samis, 15 acres.
23. Joseph Lepuoburch (La flesche), 40 acres.
24. x Edward Esau (police), 22 acres.
25. Na-zair-duzze x Dwight, 12 acres.
26. Louis Saunsoci, 45 acres.
27. Ma-ste-an-zee, x 16 acres.
28. x Phillip Sheridan, 12 acres.
29. x Blackbird Sheriden, 15 acres.
30. William Provost, 30 acres.
31. He-ba-zhor x Oliver Mitchell, 14 acres.
32. Wah-sin-sin-de, x Samson Gilpin, 10 acres.
33. Num-ba-moni, x Charles Webster, 9 acres.
34. Shu-shing-ga, x, 20 acres.
35. x John Pilcher, 30 acres.
36. Fred. Cayon, 15 acres.
37. Sin-de-hah-bah x, 45 acres.
38. J. M. Spuyer (John Springer), 22 acres.
39. Hun-gah-te x (Big Omaha), 14 acres.
40. William Tyndall (2d sergeant police), 20 acres.
41. Tah-waugh-gar-a-ghinga x Cyrus Blackbird, 25 acres.
42. Uriah Merrick.
43. Ma-ga-tah x Joseph Cox, 10 acres.
44. Wah-ga-a-sha x Luke Cox.
45. Ega-hun-ga-sha x David Wells, 10 acres.
46. Gah-e-va-zhe x Walter Morris, 10 acres.

47. Ta-hoo-tom-bee x Oharles Robinson, 15 acres.
48. Thomas McCauley, 30 acres.
49. En-la-bee x George Miller, 20 acres.
50. David Stbler (Stabler).
51. Nebraska x, 25 acres.
52. 7½ acres.
53. 20 acres.

1. *Kah-a-num-ba (Two Crows) Lewis Morris.* Full blood. Has claim No. 315. Broke 7 acres, eight years ago. Has 18 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, garden fruit. Planted apple-trees and timber. Built frame-house six years ago, paid money and ponies for it. Has bought some farming implements, and received from government. Has ponies, cows, pigs, chickens turkeys. Supports six persons. Sixty years old. A chief. He was one of seven Indians who twenty-five years ago clubbed together, each one contributing $2, and bought a plow, the first one they had ever used. He has suffered much from the loss of cows and horses stolen by the Winnebagoes – 2 cows, 16 horses; this has hampered his farming. His remarks in full in Appendix.

2. *Dou-ba-moni, Harrison McCauley.* – Full blood. Has claim No. 232. Broke 4 acres five years ago. Has 16 acres under cultivation; not including hay lands. Raises wheat, corn, potatoes, vegetables, garden fruit. Planted apple and cherry trees, and timber. Built dugout four years ago. Has bought farming implements, and received from government.

Has ponies, cows, pigs, chickens. Supports 4 persons. About 45 years old. A chief. Worked on the bottom-lands ten years ago. Remarks in full in Appendix.

3. *Segro-numya, George Grant.* – Full blood. Has claim No. 317. Broke 9 acres 5 years ago. Has 21 acres under cultivation, not including hay fields. Raises corn, wheat, potatoes, vegetables, garden fruit. Planted apple trees and timber. Built mud lodge, cattle sheds, corn cribs, &c. Has bought farming implements, and received from government. Has ponies, cows, pigs, chickens, turkeys. Supports 5 persons. About 47 years old. Is now in the United States Indian-police service. He was one of the seven who, twenty-five years ago, contributed to the purchase of the plow. He says:

"Although I have no children, I have worked hard on my land so that I should not go round begging. I thought the land was my own, so I went to work and cultivated it. Now I have found out it is not my own, and this makes me stop. I am afraid if I should build a house and spend money on it, I would lose it, if the government should move the Indians from this land. Three times I have cut wood to build a house. Each time the agent told me the government wished to build me a house. Every time my wood has lain and rotted, and now I feel ashamed when I hear an agent telling me such things. * * * God knows I am telling the truth in all this. It may be for something very wrong that the Indians have done that God is punishing us so now * * * I want a title to my land; I want a house that is my own."

4. *To-oh-ka-hah, Arthur Ramsey.* – Full blood. Has claim No. 220. Broke five acres six years ago. Has 32 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, melons. Built log house, bought windows and doors. Has bought farming implements and machines, and received from government. Has ponies, cows, pigs, chickens. Supports six persons. About forty-seven years old. Is now in United States Indian-police service. Has suffered from having horses stolen by Winnebagoes. He says:

"I belong to the citizen's party. I was one of its originators. We want to become citizens. We wish to have laws like the white men, to have courts to appeal to, and to have good titles to our lands. * * * I have always wished this from the first time I thought over it. * * * It seems to me as though the Indians had not strength; they have no horses, only ponies; it is all they can do to move on a little. * * * It is as if the Indians were left out in the winter. This year we have made nothing, our crops were so poor, but it is God's will."

5. *Wa-jepa, Ezra Freemont.* – Full blood. Has claim No. 235. Broke 10 acres five years ago. Has 55 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruits. Planted apple and cherry trees and timber. Built frame house, painted and papered; paid for it in ponies and money; built outbuildings, &c. Has bought farming implements. Was one of three Indians to purchase a reaper. Contributed $50. Received from

government. Has ponies, cows, pigs, chickens, turkeys, ducks. Supports nine persons. About forty years old. He says:

"Before I began to farm I was just a wild Indian, doing as I pleased, going round the country looking for death. * * * We have no government on the reserve. We have trouble all the time, which we would not have if we had government and law. We want these. We are right among the white people, and as we have no law, we can't get along very well. There are persons living on the reserve who have certificates of allotment, they believe that the land is theirs, and that they can always keep it. I know differently. I know that the certificates are not good. I want a title to my land, then the land will be mine. If the government does not give to us, titles, I do not know what we are going to do. I went on my farm with my certificate. I believed the land was mine. I have found out the land is not mine, that the government can take it away. We are going to ask for our titles. As long as the government does not give them, we will ask until the government gets tired. We won't stop asking till we get our titles."

6. *Joseph Merrick.* – Full blood. Has claim No. 327. Broke 7 acres five years ago. Has 16 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruit. Planted apple trees. Built frame house five years ago. Outbuildings. Bought tools. Received implements from government. Has ponies, cows, pigs, chickens, ducks. Supports nine persons. About thirty-three years old. Works

upon his father's claim, who is old, and lives with him. He says:

"I went on my farm with my certificate. I soon lost faith in it, for the people told me it was good for nothing. One reason I have not broken more land is because I am always in fear that the land may be taken away from me. * * * I hope God will help us to get titles. * * * I bought something and paid for it, but the man did not give me what I bought and paid for. I wish that we had law, for then this man could have been made to give me what I had paid for. I want law here, that justice may be done for all. I belong to the party that wishes to become like white people, and to be citizens."

7. *Pawnee-numph-zhe, Jorden Statle.* – Full blood. Has claim No. 272. Broke eight acres six years ago. Has 18 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, melons. Planted apple trees. Built frame house five years ago, paid for it by ponies and cash. Has bought farming implements, and received from government. Has horses, cows, pigs, and chickens. Supports ten persons. About fifty years old. Is now in the United States Indian-police service. He also works on claim No. 229, which belongs to his cousin, Nooga-Suda, Phillip Statle, who is blind, making in all some 26 acres which Pawnee-numph-zhe cultivates. He says:

"I am one of the men who wish to have titles to their lands. These men want titles because they want what is their own, to be their very own, so that they

may be able to give their land to their children. When I get my title it will be the best thing I can have; this I know. I hope all those who sign this petition will get titles to their lands."

8. *Pah-see-do-uba, Jonathan Rush.* Full blood. Has claim No. 233. Broke 5 acres five years ago. Has 15 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted peach-stones, trees came up well, also timber. Built sheds. Lives in a tent. Has bought implements, and received from government. Has ponies. Supports three persons. About sixty years old. Has suffered heavy losses from fire, and can't afford a house. He says:

"I want a title to my land. I am an old man; when I die I want to leave my farm to my child. I belong to the party in favor of advancement."

9. *Ma-e-thing-ge, No Knife.* – Full blood. Works on a claim. Has 18 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables. Planted apple trees, timber. Built mud lodge, sheds, &c. Bought implements, and received from government. Has ponies, cows, chickens. Supports five persons. About sixty-five years old. His certificate of allotment of land was taken from him when the Omahas transferred lands to the Winnebagoes. He was one of the seven who, twenty-five years, ago contributed to the purchase of the plow. He has suffered many discouragements.

10. *Wah-na-zh-zhinga, Little Soldier.* – Full blood. Works on a claim. Broke 10 acres five years ago. Has 15 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees. Built house, part log, part dug-out, sheds, &c. Bought implements, and received from government. Has one pony, chickens. Supports two persons. Sixty-seven years old. His certificate of allotment taken at time of transfer of lands to Winnebagoes. He has labored against great odds. He says:

"The man who surveyed the lands and the man who gave me the 'certificate' told me that no one could take the land from me, but it was taken, and they seemed to make very easy work of it when they wanted to take it. I felt very bad when they took the paper. I have not heard a word about taking the land; it was all the work of the chiefs. I thought the 'certificate' was a title. I wish I could have the land back that was taken. Money is good, but I think more of the land. I want a title to my farm. I want this land to be my own. * * * You see me now; I am growing old and getting so that I can't do much, but I keep on working and mean to work. * * * I have had a great deal of trouble. I could stand here and tell you of it all day, but I will not say any more about it."

11. *Wah-zhe-umba, Alvin Cox.* – Full-blood. Has claim No. 318. Broke 8 acres five years ago. Has 16 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees. Built mud lodge, cattle-sheds &c. Has

bought implements, and received from government. Has ponies, cows. Supports eight persons. About fifty years old. He says:

"I want a title to my land. I am worried, for I am afraid that the Indians may be moved away."

12. *Ma-hah-ta, Henry Morris.* – Full-blood. Has claim No. 214. Broke 5 acres five years ago. Has 29 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees, timber. Built dugout and mud lodge, sheds, &c. Has bought implements, and received from government. Has ponies, cows, pigs, chickens. Supports eight persons. About fifty-five years old. He was one who went to work twenty-two years ago. Has suffered from fire, losing "everything but his blanket." He says:

"I have had hard work to get along, and to obtain for myself the things I have. People will come from the East and tell us to work and work hard, but they never come to our homes and see what we have to work with. * * * Instead of that they speak a little, and go back to the East. * * * I have heard your words that you are coming to see me in my own house; that is something I have never heard before from white people. * * * Although it has been hard for me to do what I have accomplished, I still want to keep on doing. I want a title to my land. I look around and see the white people, and I see that their way of doing is best. Two years ago, I think, two commissioners came from Washington, and they told us to go on and work,

that the Indians' arms and hands were as large and strong as the white man's; but it seems to me as though the Indian is yet able to use only his hands."

13. *Ma-he-wa-the, Richard Robinson.* – Full-blood. Has claim No. 257. Broke 5 acres four years ago. Has 18 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruits. Planted apple and cherry trees, and timber. Built log house, paid for some material and work, sheds, &c. Bought implements and tools, and received from government. Has ponies, cows, pigs, chickens. Supports eight persons. About forty-five years old. He says:

"When I was a young man I wanted to work. When I first tried to plow I used to fall down, for I did not know how to handle the plow. I thought that one day all the Indians must work; that I would try and learn while I was young, it would be easier for me. When I first saw the white people, I saw that they worked, and al they had seemed to sparkle. I wondered where this glistening came from. I saw that they worked at the ground, and it was from that that they got the sparkle. * * * I want a title to my land. I hope the white people will help us so that we may have law upon the reserve. * * * I hope that in the future some of the children of the Omahas may be among the lawyers of the land. The reason the Omahas are still in existence is, I think, because they have worked, are working, and trying to help themselves."

14. *Wa-loo-teta, Samuel Irving.* – Full-blood. Works on a claim. Broke 8 acres five years ago. Has 8 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Lives in a tent; bought the tent-cover. Bought tools; received implements from government. Has ponies, cow, pigs, chickens. Supports seven persons. About thirty-two years old. He says:

"I have always wished for a title to my land. If the Indians could have title to their lands they would go to work with a will. All the young men who are working for themselves want to have laws like white men, that justice may be done."

15. *Mumba-Douba, Levi John Webster.* – Full-blood. Has claim No. 237. Broke 8 acres four years ago. Has 16½ acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees and timber. Built log house two years ago; bought some materials, shed, &c. Bought implements, and received from government. Has ponies, cows, chickens. Supports six persons. About thirty-six years old. He says:

"I want a title to my land; my changingmy dressought to show that. I love my land. * * * I want to have law here, that justice may be done on this reserve."

16. *Wa-ho-sha-ga, James Springer.* – Full-blood. Works on a claim. Broke 7 acres six years ago. Has 12 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Built log

house five years ago; bought materials, sheds. Bought tools; received implements from the government. Has ponies, chickens. Supports thirteen persons. About thirty-seven years old. His certificate of allotment taken away on the transfer of land to the Winnebagoes. Has had misfortunes; served in the United States Army two years and six months, 1864 to 1866; honorably discharged. He says:

"I want a title to my land, so that no one can take from my children the land on which I have worked."

17. *Umpa-tunga, Big Elk.* – Full blood. Works on a claim. Broke 7 acres six years ago. Has 14 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, garden fruits. Planted apple trees and timber. Built frame house, paid in stock and money; outbuildings. Has bought implements, and received from government. Has ponies, chickens. Supports two persons. About forty-five years old. His certificate of allotment taken away on the transfer of land to the Winnebagoes. He is descended from an old line of chiefs. Has had many afflictions and been in delicate health. Remarks in appendix.

18. *Mah-wah-dah-ne, Henry Cline.* – Full blood. Has claim No. 234. Broke 10 acres six years ago. Has 28 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees, timber. Built frame house, cost him over $200; outbuildings. Has bought implements; received from the government. Has American horse, ponies,

cows, chickens. Supports five persons. About sixty years old. Has suffered severely from fire. He says:

"I have taken hold of the plow. I did not know how, but I put in my ponies, and my wife held the reins. * * * There is a party among us in favor of titles. When it first started I was one of them. * * * I want a title to my land. I may never know all the good it will bring, but my children will know. * * * If I were a young man, I would say much; but I am too old to speak much. The reason I have worked so hard is that I wished to set an example to others, that they might see how an old man could work, because he wanted to."

19. *Frederick Merrick.* – Full blood. Has claim No. 325. Broke 4½ acres four years ago. Raises corn, wheat, potatoes, vegetables. Planted apple trees. Has 3½ acres cultivated. About to build a log house. Has corn-crib, &c. Has ponies, cows, chickens. Supports five persons. About twenty-eight years old. He says:

"I want a title to my land. The Indians are not as strong as the white people. They have not the implements nor strong horses to work with as the white people have; but for all that the Indians want to go on and do all they can on their land. * * * If they had some one to teach them they would learn. Then they would get on faster in their work."

20. *Matthew Tyndal.* – Full blood. Has claim No. 255. Broke land seven years ago. Has 27 acres under cultivation, not including hay lands. Raises corn, wheat, vegetables, garden fruits. Government

built house; he hauled timber. Outbuildings. Bought tools. Received implements from government. Has one American horse, pony, cow, and calf. Supports seven persons. About thirty-seven years old. Is captain in United States Indian police service. He has helped his father, worked his land; given him a wagon and ox-team worth $200; also assisted his brother-in-law, who is now prospering. Served in the United States Army two years and six months, 1864 to 1866. Honorably discharged. Worked at the mill. Been on police three years. He says:

"It is plain to see that the government owns my land.* * * The Omahas will do better when they have titles to their lands. They will make improvements and plant timber. One reason why they have not made more progress is because they are always worried about this thing [not owning their land]. If they don't get titles to their lands they will not be able to stay here, for the government will take away the land from them. This is why they beg the men in Washington to do all they can to get us titles to our lands."

21. *Tah-ha-zhinga, Badger.* – Full blood. Has claim No. 226. Broke 12 acres six years ago. Has 15 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple and cherry trees. Bought his house; paid by lumber. Sheds. Bought implements. One of the three Indians to contribute $50 towards the reaper received from government. Has ponies, cows, chickens.

Supports six persons. About forty-five years old. Farmed years ago. He says:

"I am one of the men who want a title. It used to be that I never thought of these things, but now I am always thinking of a title to my lands, of law and civilization. * * * I am not a white man, but when I am working I enjoy myself. * * * To go roaming about the country is as hard as working. When one works one gets something for one's trouble, but not when one goes round the country. * * * We will work all the harder when we get titles to our lands."

22. *Noah Samis.* – Full blood. Works on a claim. Broke 5 acres four years ago. Has 15 acres under cultivation, not including hay lands. Raises corn, wheat. Planted timber. Has lumber ready to build. Lives with father-in-law. Has bought tools. Received implements from government. Supports three persons. About twenty-five years old. He says:

"I want a title to my land, that I may have a home surely my own."

23. *Joseph Laflesche.* – Half French. Has claim No. 225. Broke this land sixteen years ago. Has 45 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruits. Planted apple and cherry trees; grapevines. House built by government; he furnished lumber. Outbuildings. Has bought implements. One of three to contribute $50 toward the reaper received from government. Has American horses, ponies, cows, pigs, chickens. Supports eight persons. About fifty-seven

years old. One of the remarkable men of the tribe. The leader toward citizenship. One of the seven who bought the plow twenty-five years ago. He bought other implements, and oxen, at that time. He started a farm twenty-two years ago, on the bottom-land; had it fenced; formed a village. Each family lived in a house. He, for himself, built a large frame house, finished with plaster, painted, and furnished. Was at one time a trader. Was head chief for some years. Deposed politically. (Remarks in full in appendix.)

24. *Han-de-mony, Edward Esau.* – Full blood. Has claim No. 68. Broke 7 acres six years. Has 22 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees. Built dugout three years ago. Outbuildings. Bought implements; received from government. Has ponies, cow, pigs, chickens. Supports six persons. About forty years old. Is in the United States Indian police service. Has suffered from fire and other disasters. He says:

"When I was a boy I saw much game and buffalo, and the animals my forefathers used to live upon, but now all are gone. Where I once saw the animals I now see houses, and white men cultivating the land; and I see that this is better. I ought long ago to have tried to work like the white man; but for several years I have been trying, and perhaps in the future I can do much better for myself and my friends. * * * I want a title for my land. I am troubled about it, for I am not sure I can have the land if I do not get a title. * * * In the morning I get up and look at my fields, and I wish

that God may help me to do better with my land and let it be my own."

25 *Na-zin-duzze, Dwight.* – Full-blood. Works on a claim. Broke 12 acres five years ago. Has 12 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Lives in a tent. Bought tools; received implements from government. Has ponies; lost cow last summer. He says:

"I work on a piece of land, and it is as though it did not belong to me. I want a title."

26. *Louis Saunsoci.* – Half French. Has claim No. 254. Has 45 acres under cultivation, not including hay field. Raises corn, wheat, potatoes, vegetables. Government built houses; he hauled timber. Had American horses; lost by disease. Cow. Supports ___ persons. About sixty years old. Has been interpreter to Otoes and Omahas for several years. Has suffered severely from loss of eyesight. Had other disasters. He says:

"I want a title to my farm."

27. *Ma-sta-an-zee.* – Full-blood. Has a claim. Broke 6 acres five years ago. Has 16 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees. Built mud lodge three years ago; sheds, &c. Received implements from government. Has ponies, cows, chickens. Supports seven persons. About thirty years old. He says:

"I want title for my land. It will then be well for me."

28. *Phillip Sheriden.* – Full-blood. Has a claim. Has 12 acres under cultivation, not including hay lands. Raises corn, wheat. Received implements from the Government. Has ponies, cows. Supports six persons. About twenty-four years old. He does all the work on his father-in-law's farm – about 30 acres – and lives with him. He says:

"I have not been able to settle on my claim on account of my father-in-law, but I am going to build a house on it and live there, and I want a title to my land that I may have a permanent home."

29. *Blackbird Sheriden.* – Full blood. Has a claim. Broke it six years ago. Raises corn, wheat, potatoes. Planted fruit trees and timber. Built log house; paid carpenter $60. Outbuildings. Bought implements, and received from government. Has ponies, cows, pigs, chickens. Supports seven persons. About twenty-six years old. Also works upon his father's land – 24 acres. He says:

"I know how good it is to work. I want a title to my farm that it may be secure to me."

30. *William Provost.* – Half French. Has a claim. Broke land three years ago. Has 30 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, garden fruits. Planted timber. Built a log and box house; sheds. Bought implements, and received from government.

Has American horses, ponies, cows, pigs, chickens. Supports seven persons. About twenty-six years old. He says:

"I want to get a title to my lands."

31. *He-ba-zhoo, Oliver Mitchell.* – Full-blood. Has claim No. 253. Father (dead) broke it eleven years ago. Has 14 acres under cultivation, not including hay lands. Raises wheat, corn. Planted fruit trees. Lives in a tent. Built sheds. Received implements from government. Has pony, cow, pigs, chickens. Supports four persons. About twenty-three years old. He says:

"I will be very glad to get a title to my farm."

32. *Wah-sin-sin-de, Sampson Gilpin.* – Full-blood. Has claim No. 29. Father (dead) broke it twelve years ago. Has 10 acres under cultivation, not including hay lands; raises corn, wheat, potatoes, vegetables. Planted apple and cherry trees, timber. Built log house five years ago, outbuildings. Bought tools, &c. Received implements from government. Has ponies, cows, pigs, chickens. Supports eight persons. Twenty-three years old; has had responsibility since quite a youth. Has worked. He says:

"Now it is as though we had no homes. Years ago white people told me to go to work and make a home. I have tried, and done the best I could, but I cannot do as the white man does. I am not so strong. If I can get a title to my farm I shall try more and more to do as my white brothers do."

33. *Num-ba-moni, Charles Webster.* – Full blood. Has a claim. Broke 5 acres seven years ago. Has 9 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, melons. Planted apple and cherry trees, and timber. Built log house; bought some materials; sheds. Has ponies, cows, chickens. Bought implements; received from government. Supports eight persons. Thirty-five years old. He says:

"I hope we will get titles to the lands on which we have worked, that this may be our home always."

34. *Shu-shurg-ga, Prairie Chicken.* – Full blood. Has a claim. Broke 10 acres nine years ago. Has 20 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables. Planted apple trees, timber, grape-vines. Built frame house and dug-out; paid for it; sheds. Bought implements, and received from government. Has ponies, cows, pigs, chickens, ducks. Supports five persons. About fifty years old; a chief. He says:

"I have worked on my land, and as I look at the hills I think; if any one should come and tell me to go away; I know no place to go to. Here my father lived; here I have worked and tried to make a home. I think I could only stand here on my land till I was pushed off. It makes my heart sad to think this could ever be done. I wish I could have a title to my land. It seems to me that the government cannot refuse to give me a title. If I could get a title to my farm then I would feel happy and could work harder."

35. *John Pilcher.* – Half French. Has claim No. 67. Broke 15 acres three years ago. Has 30 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruit. Planted apple trees, timber, grape vines. Built log house, frame addition; paid out $76; worked himself. Has a well cost $30; sheds; furniture. Bought $75 worth implements, received from government. Has American horses, cows, pigs, chickens. Supports ten persons. About fifty years old. He says:

"I want a title to my land. I want a home so that when I die my children will have a home. I have worked hard here, and here I want my bones to lie. I have worked hard, and will work hard, but I want to be sure that the land is secure to me; so I want a title to my farm."

36. *Fred Cayon* (married to Omaha woman.) – White. Works on wife's claim. Broke 10 acres ten years ago. Has 15 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, makes sorghum. Planted apple and cherry trees. Built log house; sheds. Bought implements, and received from government. Has American horses, cows, pigs, chickens. Supports five persons. Forty-one years old. He says:

"I want to get a title to this land that it may be secured to my children."

37. *Sin-de-hah-hah, Wm. Hamilton.* – Full blood. Has claim No. 222. Broke land six years ago. Has 50 acres under cultivation, not including hay lands.

Raises corn, wheat, potatoes, vegetables. Planted apple trees. Frame house, built by government; he furnished lumber. Bought implements, received from government. Has American horses, cows, pigs, chickens. Supports nine persons. About fifty years old. Was one who farmed twenty-two years ago on the bottom – Laflesche's village. Has built four houses. Is a chief. He says:

"Long ago we never used to think of anything but our old ways of living. I first began to work when the Omahas lived near Bellevieu; that was before the land down there was sold. I used to saw and cut wood for the mission. I made use of the money I earned right away. I bought a horse. I saw that the money was in the wood. * * * When we moved out upon our claims I thought I would be the first to break land, and I was. * * * I have seen that it is good to work and I do not think I would stop working. When I am working on my land I am always thinking of my children. I wish I could work without feeling a bit worried. When I hear anything about people wanting to get this land away it just frightens me! I wish it could be so that the land would be always mine. I do not care so much for myself as for my children, for I hope when I die to leave something to them. That is the way the white men do. I think they leave what they have to their children. I want a title to my farm. I think of it every day, and I have come to-day to tell you so."

38. *John Spinger.* – Full blood. Has claim No. 326. Broke 10 acres five years ago; has 22 acres under

cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables; planted apple trees, built log house four years ago, sheds, &c. Bought implements, and received from government. Has American horses, ponies, cows, pigs. Supports six persons; forty-one years old. Has served in the United States Army two years and six months; honorably discharged. He says:

"I want a title to the land on which I have worked that I may have a home."

39. *Hun-ga-te* (Big Omaha). – Full blood. Has a claim. Broke 6 acres five years ago; has 14 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables; lives in a tent. Corn-crib, sheds, &c. Received implements from government. Has ponies, cows, chickens. Supports seven persons; about thirty-four years old. He says:

"I want a title to my land. I have walked many miles to tell you these things, and to put my name to this petition."

40. *William Tyndall.* – Full blood. Works on a claim. Broke 5 acres six years ago; has 20 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, garden fruit; planted apple trees and timber; built log house, bought material, sheds, &c. Bought implements and tools, and received from government. Has ponies, cows, pigs, chickens, turkeys, ducks. Supports six persons; about thirty-two years old. Is in the United States Indian-police service, second sergeant. Served in the United States

Army two years and six months; honorably discharged. He says:

"I would like the white people in Washington to help us to get our land, so that what land we work we may be sure it is our own. We want titles. We want our children educated. We want order. I think push, as my brother Matthew Tyndall does."

41. *Tah-waugh-gar-a-zhinga, Cyrus Blackbird.* – Full blood. Has claim No. 251. Broke 11¼ acres six years ago; has twenty-five acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables; planted apple trees, built frame house, cost him $300, sheds, &c. Bought implements and received from government. Has American horses, cow, pig, chickens. Supports nine persons; about fifty-five years old. He says:

"I want a title to my land. When I first went on my claim I was one of the first to want a good paper and to recommend trying to get one; it is a good thing to get a title to our lands; then when we die the land will be our children's. I like to work, but when I hear anything about "removal," then it makes me feel as though I could not work. One reason I have worked so hard is, on account of my children. I have put up a house, and done all that I could, and I want my children to stay here. I want a title that will fix it."

42. *Uriah Merrick.* – Full blood. Lives with his father-in-law, Mah-wah-dah-ne. He starts next spring upon a claim; intends to build a house, and make a home. Before his marriage, worked for mother, and

since then for his wife's father. Supports two persons; about nineteen years old. (Although he had not fulfilled the engagements of the petition, it did not seem best to refuse his name.)

43. *Ma-ga-tah, Joseph Cox.* – Full blood. Has a claim. Broke 10 acres. Has 10 acres under cultivation, not including hay lands. Raises wheat; will build a house next spring. Lives with father. Received implements from government. Has ponies, cows. Supports three persons. Twenty-one years old. He says:

"I want a title to my claim, that I may have a home."

44. *Wah-ge-a-sha, Luke Cox.* – Full blood. Has a claim. Broke land last year; will build a house next spring. Lives with his father. Received implements from government. Has ponies, cows. Supports three persons; nineteen years old. He says:

"I would like to have a title to my land that it might be my own, and I could always live there."

(Another young man whose name it did not seem best to refuse.)

45. *Ega-hun-ga-sha, David Wells.* – Full blood. Has a claim. Father broke land five years ago; has 10 acres under cultivation, not including hay lands. Raises wheat, corn, potatoes, vegetables, melons. Father built dug-out two years ago. Received implements from government. Has pony. Supports three persons; eighteen years old. Father's certificate taken when land was transferred to the Winnebagoes.

Father died this year, after a lingering illness; mother nearly blind. A little sister depending on him. He says:

"I want to get a title to my father's claim, so that I can make a home and take care of my mother and little sister.

46. *Gah-e-bazhe, Walter Morris.* – Full blood. Has a claim. Broke 5 acres four years ago. Has 10 acres under cultivation, not including hay lands. Raises wheat and corn. Will build a house next spring; lives with father. Received implements from government. Has ponies, cow. Supports three persons. Twenty-six years old. He says:

"I want a title to my claim, so that I can have a home that is my own."

47. *Ta-hoo-tom-be, Charles Robinson.* – Full blood. Has a claim. Broke land three years ago. Has 15 acres under cultivation, not including hay lands. Raises wheat and corn. Will build a house on his claim; lives with father. Has pony. Supports three persons. Twenty-eight years old. He says:

"I want to get a title to my claim, that the land may be mine."

48. *Thos. McCanley.* – Full blood. Has a claim. Has 30 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables, melons. Planted apple and cherry trees. Built frame house three years ago; bought the materials. Received implements from government. Has American horses,

cost $250 – cows, pigs, chickens. Supports five persons. About thirty-three years old. He learned carpenter's trade at agency seven years ago; is now the head carpenter. He says:

"We ought to have titles to our lands. * * * We were born here. We ought to stay here. * * * I have heard there are some people who would try to move us away. * * * We did move away from Ohio. We kept on moving to the north and we have got enough of moving. * * * There are some people who try to make money in this world. They try to kill the Indians by moving them away to some bad place where they can't get along. If we are moved away we shall die poor. When the last day comes we shall see those men who tried to kill the Indians, and that is the time those fellows will see what they have done, and they will feel bad. I hope God will help us!"

49. *En-labee, George Miller.* – Full blood. Has a claim. Broke 8 acres five years ago. Has 20 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple trees; lives with father. Received implements from government. Has ponies. Supports three persons. Twenty-six years old. He says:

"I would like to receive a title to the land which I have worked."

50. *David Stabler.* – Full blood. Has a claim. Broke land this year. Built a house last fall. Has pony cow, and calf. Supports four persons. About twenty-seven years old. Has worked at his trade, and for his

father on his farm. Learned the carpenter trade; is now assistant carpenter. He says:

"I wish a title to my claim, that I may have a secure home for myself."

51. *Nebraska.* – Full blood. Has claim. Father broke land eight years ago. Has 25 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted apple and cherry trees. Frame house. Father built and paid for it. Outbuildings. Received implements from government. Has horses, pony, cows, pigs, chickens. Supports eleven persons. Twenty-four years old. Father died a year ago. He is eldest son, and cares for family. He says:

"I want a title to my father's land where I have worked, and where I have always lived. The last year has been a bad one. The crops failed, and I have been sick. I shall feel easier and work with more heart when I have a title to the land."

52. *Frank Saunsoci.* – One-quarter French. Has a claim. Broke 7½ acres three years ago. Has 7½ acres under cultivation, not including hay lands. Raises wheat, corn. Received implements from the government. Has American horse and pony. Supports three persons. Twenty-five years old. He works his father's land. Is the farmer at the government school. Has charge of garden and crops. He says:

"I want a title to my land that I may make a home. I want to feel sure that my children can have a home. I can improve my land more when I have a

better team. I want to have the law here that the Indians may advance. I have to work over 60 acres."

53. *Anslee White.* – Full blood. Has a claim. Broke 5 acres seven years ago. Has 20 acres under cultivation, not including hay lands. Raises corn, wheat, potatoes, vegetables. Planted fruit trees. Built log house; outbuildings. Received implements from government. Has ponies, cows, pigs, chickens. Supports six persons. About thirty-three years old. He is assistant government farmer. He says:

"I want a title to my land, so that no one can take it away from me. I want it secure to my children. I have cultivated my land to make it my home, and I want my children to have it after me. I did think the land was mine, but now I am convinced the land is not my own. I want a title, so that I may never have to leave the land. I want law. I want it to be here just the same as it is among the white people. I can't go back to the old ways. If I had a good span of horses, no white man should beat me at working on a farm."

APPENDIX.

1. – *Remarks of Kah-a-num-ba. (Two Crows.)*

It is now about six years since the Poncas were removed to the Indian Territory, and ever since that time we have been wanting titles to our lands. We have been afraid that one day we should be taken from our lands, as the Poncas were. We want titles to our lands, so that we can hold our farms and stay on

them. For this reason we have asked the government to give us titles. White men have told us that if we only "occupy" the land we will surely be moved, as were the Poncas. Our agent, some years ago, Mr. Vorr, helped us. He told us to go to work, and he would write to Washington and ask that titles be given to us. When I was in Washington last summer, I told the department that we wanted titles; that we were worried about our lands. I was told that titles should be given us, and that it should be so fixed that no one could sell his land for 25 years, and that this regulation should be so made that no one could break it. If this can be done, and we can have titles, we will work harder than we have done, for we will not be worried. There are some Omahas who have not sense enough to see the good that titles to our lands will bring us. We ask the government to grant to each one who has worked, and who deserves it, a title to his land. We want titles, for now the land is not our own. We want it for our own, that we and our children may live and work here. There are some men who have not signed this petition. When the Omahas first went upon claims these men were then willing to ask for titles, but they have turned back because they could not have their own way and control the men who wished to go forward. We want to advance toward law. We look to the future and think of our children, and what will be best for them.

2. – Remarks of Douba-moni.

There was a time when I was like the old men who do not think, and are not troubled. When I was like them it seemed as though I should fall at every step I took. Since I began to think, and have joined, the party to which the men belong who desire to become citizens, it seems as though I can stand up. The road our fathers walked in is gone; the game is all gone; the white people are all about us. There is no use in any Indian thinking of the old ways; he must now go to work as the white man does. We want titles to our lands that the land may be secure to our children. When we die we shall feel easy in our minds if we know the land will belong to our children, and that they will have the benefit of our work. There are some Omahas who do not yet care for titles. We desire the government to give titles to those who ask for them, and in this way let us apart from those who do not want to work, and let us go on and try to become like the white people. We are willing the others should do as they please, but we are not willing that they should keep us from getting titles to our lands. Our children would suffer even a greater wrong than would befall us. Give us who ask titles to our lands. We have worked for them. We will continue to work and to go forward. We will show the white people that we mean what we say. I wish all the Indians were of one mind – that all of them thought as we do who sign, but when we get our titles it will help them. If but a few men sign this petition, give to those few men titles to their farms. Help us! Do not let us be

held back and our children be sufferers, because of the inaction of these who do not seem to care for the future.

17. – *Remarks of Um-pa-tun-ga (Big Elk).*

When we look at a person we are apt to know what that person is thinking of. All who look at me must know I am thinking, of a title to my land, of becoming a citizen and being like the white people. I wish I could speak English, then I could tell you directly from my heart of the way in which I wish to go. I could talk to you of that way which is right. Wherever I am, or wherever I go, I think God will do what is best. I hope God will help me in my efforts to be like the white men, and that as long as I live he will help me to do right, and that he will put it in the hearts of all good men in Washington to help us at this time. We want titles to our lands. We are thinking of little else. We shall think of little else until we get our titles. We are afraid of losing our land. When we receive titles to our farms then we shall be treated as men. When we get our titles, as long as we live, we will always remember those who have helped us in this thing. God tells us to love one another. I beg all men who have good hearts to help us in this request.

23. – *Remarks of Joseph Laflesche.*

FRIENDS: I wish to speak to you of some of our troubles. First, I will tell you of some things in the past. I was born in this country, in Nebraska, and I

have always lived among the Indians. There was a time when I used to look only at the Indians and think they were the only people. The Indians must have been long in this country before the white man came here. I do not know how the Indians got their seed, but they had corn and squash and beans, when I was young. In the spring they would take their seed and farm their one or two acres. There were no idlers, all worked in the spring. Those who had no hoes worked with pieces of sticks. When they got their seed in they went on the hunt. They had nothing to worry them; all they thought of was their little garden they had left behind. In the middle of the summer they came back with the skins for their tent-cloths, the meat for their food, and the skins for their clothing. They made use of all animals. When they got home they gathered their corn, dried it, buried a part of it, and taking enough to serve them, started out on the winter hunt to get furs. Then it was I used to see white men, those who were going around buying furs. Sometimes for two or three years I would not see any white men. At that time the country was empty, only animals were to be seen. Then after a while the white men came, just as the black-birds do, and spread over the country. Some settled down, others scattered over the land. The Indians never thought that any such thing could ever be. It matters not where one looks now, one sees white people. These things I have been speaking about are in the past, and are all gone. We Indians see you now, and want to take our steps your way. We turn ourselves toward you that you may help us. It seems as though

the government pushes us back. It makes us think that the government regards us as unfit to be as white men. The white man looks into the future and sees what is good. That is what the Indian is doing. He looks into the future and sees, his only chance is to become as the white man. When a person lives in a place a long time he loves the place. We love our lands and want titles for them. When one has anything he likes to feel it is his own and belongs to no one else; so we want titles, then we can leave our land to our children. You know, and so do we, that some of us will not live very long; we will soon be gone into the other world. We ask for titles for our children's sakes. For some years we have been trying to get titles, but we have never heard from the government. A little while ago I heard what the President said in his message, and it seemed as though he was giving me a cup of cold water when I was very thirsty. We are not strong enough to help ourselves in this matter, so we ask you to help us. In the past we only lived on the animals. We see that it is from the ground that you get all that you possess. The reason you do not look upon us as men, is because we have not law, because we are not citizens. We are strangers in the land where we were born. We want the law, that we may be regarded as men. When we are in trouble we want to have courts to appeal to. The law will teach wrong-doers. It will prevent trouble, as well as punish those who commit offenses. We know that in asking for titles we are asking for that which will bring responsibility. We are ready to accept it, and to strive to fulfill its requirements. It seems as though in the

past the government had not listened to the words of the Indians. We know our own needs, and now we speak to you directly.

* * *

the kind-hearted people of the East. True, there may be some instances of want and suffering – so the world over – but in the main they are most liberally cared for.

Hoping that I may prove beneficial and instrumental in the hands of the Government in aiding it in civilizing and advancing this people toward a condition of self-supporting, law-abiding, intelligent Christian citizenship,

I am, sir, with great respect, your obedient servant,

BURTON PARKER,
U. S. Indian Agent.

THE COMMISSIONER OF INDIAN AFFAIRS.

OMAHA AND WINNEBAGO AGENCY, NEBRASKA,
September 18, 1885.

SIR: I have the honor to submit this, my fourth annual report.

This agency is situated in Nebraska, 25 miles south of Sioux City, Iowa. The reservation is 18 by 25 miles in extent, on the west bank of the Missouri River. This land was reserved by the Omahas when

they ceded to the Government what is now the State of Nebraska, and was held by them alone until the Winnebagoes were removed from Minnesota to Crow Creek, Dakota Territory, and from there they drifted down to the Omahas.

The Government later purchased the north part of the Omaha Reservation for a home for the Winnebagoes. This was not a judicious thing for the Omahas to do, as numerous differences have arisen between them because of the close proximity of the tribes, in most of which the more quiet Omahas were the victims. The most serious of these offenses was the stealing from the Omahas of near 200 ponies by the Winnebagoes. This matter has been investigated, and a bill was before Congress, recommended by the honorable Commissioner of Indian Affairs, to reimburse the Omahas from the Winnebago fund for this loss, but the bill was lost for want of time and has not been renewed. I earnestly recommend that something be done in this case.

The Omahas have reducd their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder. The work of alloting them was so faithfully done by Miss A. C. Fletcher that the Indians have gone to work in earnest to make them homes on the land which they now believe to be theirs.

More than a year ago the Omahas felt themselves competent to do their own work and attend to

their own affairs. At their request all their employés were discharged and they were left to themselves. The result, which then seemed doubtful, has shown the wisdom of their choice. They have attended to their own business and paid for their own work and are more independent and manly than before because of the consciousness that they are becoming men. They purchased eight reapers themselves and saved their 2,000 acres of wheat, doing all the work and making their own plans themselves. They are justly proud of this achievement. I earnestly hope that this spirit of independence will be fostered in them and they be permitted to attend to their own affairs with an occasional visit from the agent for the purpose of giving them advice and encouragement. They are manly men and are going in the right way.

The Omahas have a mission school for girls established many years ago by the Presbyterian Board of Foreign Missions. It is a very excellent school, and is doing noble work. The ladies in charge are deserving of highest praise for their faithful labors.

There is also a Government school in successful operation at the agency, doing good work. The children are taught farm and house work at this school, and are making good progress. One thing is unpleasant about agency schools, and that is about twice a year the brightest and best of the scholars are called for and sent to Carlisle, Hampton, Houghton, Iowa, and Genoa, Nebr.

These Omahas are in a very prosperous and healthy condition, and if left to the kindly direction of my successor, Maj. C. H. Potter, they will soon become prosperous and profitable citizens and members of society.

The Winnebagoes are bright and lively people, capable of much good or great harm. Most of them have taken allotments of land on their reservation, and are living in houses and cultivating their farms. They took their lands fourteen years ago, and the frequent changes by death, migration, &c., make it necessary that their land should be reallotted and the surplus sold to actual settlers.

Small reservations are preferable in every way for the Indians. It tends to break up that demoralizing habit, roaming, and brings them in more direct contact with white people, which is of itself a civilizing influence. If every Indian family had a thrifty white family within half a mile of them the daily object-lessons would solve the Indian problem quicker than all the theoretic plans of all those philanthropists who worship the Indian at a distance.

The Winnebagoes have a Government school in healthy condition and capable of doing great good. About fifty scholars attend, and they are as teachable and tractable as white children. The scholars cultivated 45 acres of corn and 10 acres of vegetables, and the work was done well. The most valuable part of the education of Indian children is not obtained from books. The Winnebagoes are in a hopeful condition,

and if they would cease visiting and receiving visitors they would advance rapidly.

Very respectfully, your obedient servant,

GEO. W. WILKINSON,
United States Indian Agent.

THE COMMISSIONER OF INDIAN AFFAIRS.

---

* * *

[136] REPORTS OF AGENTS IN NEBRASKA.

REPORT OF OMAHA AND WINNEBAGO AGENCY.

OMAHA AND WINNEBAGO AGENCY, NEBR.,
August 26, 1890.

Sir: I have the honor to submit my first annual report, having assumed charge at this agency on the 16th of September last.

GEOGRAPHICAL LOCATION OF RESERVATION, AREA, TIMBER, WATER, AND CHARACTER OF SOIL.

This reservation is located on the eastern boundary, and embraces the entire county of Thurston, Nebr., except a portion of the reservation which has been sold and is now occupied by the white purchasers. It is bounded on the east by the Missouri River, 18 miles from the northern to southern limits, and extends west 30 miles, embracing one of the finest

tracts of land in the State of Nebraska. The eastern portion is well timbered with the valuable varieties of hard wood native to this section. The central and western portions are made up of gently rolling prairies, wide and fertile valleys, well watered by the Logan, Omaha, and Blackbird Creeks and their branches, and possessed of the finest soil.

The Winnebago tribe of Indians occupy the northern portion, containing 111,360 acres, and the Omaha tribe the southern, containing 133,840 acres. As there is nothing in common between the Omaha and Winnebago Indians, speaking as they do a different language, of dissimilar character and habits, I shall report them separately.

WINNEBAGOES.

The general condition of this tribe has not materially changed during the year. Progress toward a higher and better civilization there has been; each year adds a few to the number who have to an extent forsaken their old habits and customs, but their advancement is slow. The roving, restless disposition of these people, fostered and encouraged as it has been by their removal from reservation to reservation (having been moved no less than five times during the past fifty years), is always impeding their rapid advancement.

Population according to census just completed is as follows:

Total population	1,212
Males above eighteen years	382
Females above fourteen years	392
Children between five and sixteen years	246

Agriculture. – The cultivated acreage has been increased during the year by 980 acres of new breaking, the larger part of which is in the western portion of the reservation. Seed, grain, and potatoes have been furnished as follows:

	Bushels.
Oats	200
Wheat	500
Potatoes	280
Corn	500
Flax	330

I am pleased to say that owing to careful attention by the farmers almost the entire amount was planted, which heretofore has not been the case.

The season has been dry and in many respects unfavorable. Wheat is much below the average both in quality and quantity. Oats good. The harvesting was done in good time, and at this date the thrashing is well advanced. The potato crop here, in common with almost the entire West, is a failure. Corn that was planted in good time and well attended will be a good crop, but the season has been especially unfavorable for that portion that was late planted and poorly attended, and I am forced to say that quite a large part of the Winnebago corn belongs to the latter class. The flax has all been planted on new breaking,

and is now looking well, and if we do not have an early frost will be a good crop. Grass is good; the hay harvest was begun in good time, and the amount secured will be about the average.

Lands in severalty, illegal leasing of; aiding allottees. – The Winnebago Indians, while slow to acknowledge and accept the new conditions resulting from the allotment of the lands in severalty, are now exercising the rights of citizenship, and the industry and thrift which among all people result from the ownership of the soil, begin to be seen. Eighty-three thousand one hundred and twenty acres of the Winnebago Reservation have been allotted, covered by 958 individual allotments; 28,240 acres are as yet unallotted.

[137] Agent Warner in the last annual report from this agency fully presented the legal questions and evils resulting from the present conditions in relation to cattle men and others leasing and occupying portions of the reservation. What was true last year is equally so now, except that year by year those who have occupied these lands become more and more aggressive and independent. I present herewith what I consider the best solution of this question, and bespeak for them the consideration of your office. Of the allotted lands at least 60 per cent. belong to women, aged or infirm men, and minor children. The able-bodied men have all and more than they can cultivate in their own right. As the law now stands there is no legal way to derive any benefit or revenue from this large tract of land. It either lies idle or is

illegally occupied; in the latter case the owners derive but a small per cent, of its true rental value. I would recommend that the law be so modified or amended that allotted lands of these Indians may, under proper restrictions, be leased, the leases to be subject to the consent and approval of the Commissioner or agent, and only then when by proper showing it is made to appear that it is impossible for the allottees to cultivate the land themselves, and the leases be made only for the purpose of cultivation.

To illustrate the working of such a law: A boy is sent to one of the Eastern schools and will be absent for a number of years. He has of his own allotment 40 or 80 acres and often is heir to as much more. During his absence this land will be idle or be unlawfully used. In either case he will derive no benefit from his allotment, and on his return he will find it unimproved as he left it. On the other hand, if a legal and binding lease could be made for a term of years (in the case of those going to school to expire the same time as the school course) the land could be leased for from $1 to $2 per acre per annum with conditions for a certain amount of improvements in addition. On the young man's return from school he would find his land broken, improved, and ready for him to take hold and make an industrious and prosperous farmer. The accumulated revenue would be sufficient to supply him with team and farming tools or erect a house, and, in short, it would answer the question of "What are we to do with those returning from school?" Again, the women, aged and infirm males can not to

advantage use their land, and if judicious leases were made it would in a large measure support them.

Another feature, and by no means of the least importance, is the presence of good farmers, interspersed as they would be over the entire reservation, who would as object lessons be of incalculable value in teaching the principles of farming. This is not theory. We see the proof continually. The most enterprising, industrious, and successful Indians are those located on the borders of the reservation, whose farms adjoin the whites. With a law constructed as I have indicated, I do not think idleness would be encouraged, and much good would result, and by leasing to small farmers for cultivation the pernicious practice of leasing large tracts to cattle men would be avoided.

It has been my aim, in which the Department has given me all the aid in its power, to locate as many as possible on allotments in the western portion of the reservation. With the limited means at my command I have been able to assist but few of the many who are now anxious to open up and improve the allotments. It is of little use to get breaking done on the prairie 20 miles distant from where the owners now reside, unless teams are provided to work it and houses for the workers to live in. It has been my policy to select those who had not heretofore received Government aid, and who show a disposition to support themselves, and young men who have just returned from school, and to give them all the assistance possible. Five have been assisted to the extent

of $100 each in completing houses on allotted lands from the appropriation "aiding Indian allottees."

On the 14th day of May authority was granted me to expend $3,000 in assisting allottees in opening farms by the purchase of teams and farming tools, erecting houses, etc., also the further sum of $250 to aid a young man who had just returned from school. With this I have purchased 19 horses, 1 wagon, 10 sets of harness, and 8 breaking-plows, and will have completed by the close of the present quarter 7 houses. Of the houses I would say that while they are not large, especial care has been taken to make them warm and comfortable, so that there will be no excuse for the owners leaving them during the winter months and going to the timber, which has always been a great drawback to these people, not only of its tendency to keep up the old custom and habits, but it also prevents their getting back on their farms in season to begin the spring work when they should. The nineteen horses mentioned, with the ten sets of harness, completed teams for twelve allottees, in some cases they having one horse or set of harness; and in all twelve houses will he completed. The breaking season was well advanced before the teams could be purchased, and dry weather set in, so that the season was cut short some two or three weeks, but under the circumstances the amount of breaking done was quite satisfactory. I feel encouraged in getting even this small number started on their allotments. I believe it is the true way, and that it is much better to give a few sufficient aid to enable them to farm as they

should than to aid a larger number insufficiently. The result in a few years will be much more satisfactory.

[138] *Education.* – The Winnebagoes are provided with excellent facilities, with ample accommodations for all that can be induced to attend school. They have, however, been slow to appreciate these opportunities, and it has often been difficult to keep the school even moderately well filled. I can, however, see improvements in this respect during the year.

Winnebago Industrial Boarding-School, located at Winnebago Agency, supported by the Government. – The school buildings, with the repairs and additions just completed, are in excellent condition. A steam-heating plant has been put in, a store-room, hog and chicken house and barn have been erected during the year. My only fear for the smooth working of this school for the coming year is that the water supply may prove insufficient. The effect of the unusual dry weather for the past two years is now being felt, and wells and streams that have heretofore always been reliable are now failing. This matter was fully presented to the Department in my communication of August 9.

In reviewing the work at the school for the past year I feel highly encouraged; the advancement has been marked; especially is this true in the knowledge and use of the English language by the children. The total number who have attended this school one or more months during the year is 88, average

attendance for the year 60.64. This school can properly accommodate 90 pupils.

The farming connected with the school has been well conducted, and is successful, some 70 acres being in cultivation.

I would recommend that an assistant industrial teacher (Indian if possible) be allowed the Winnebago Industrial School. The work required is more than can be expected of one person. The children are mostly young, and the actual work required to be done on farm and garden and attention to the stock occupies his entire time, so that he is not able to give the children the instructions he should. The average age of pupils attending this school is between eleven and twelve years; the absence of older pupils is due to the fact that many of them leave to attend other than reservation schools.

I would recommend that the pupils be paid a small compensation for work performed. I am confident that it would be a wise expenditure.

The employés have been faithful and efficient, and in all respects I consider this school in such condition that we can expect from it the best results for the coming year.

School district No. 6, of Thurston County, Nebr. – This school is located in the western portion of the reservation, and is conducted by the school district officers, the Government contributing to the support by paying per capita for the average attendance of

Indian children. Under date of April 28 the honorable Commissioner sent me a communication instructing me to enter into a contract with this school district, which has been done. The school has been in session only for a short time, but I am convinced of the wisdom of the plan, as I have no doubt that the Indian children will make more rapid progress by association with white children. I shall hope to give a good report from this school for the coming year.

Missionary work. – All the missionary work at this agency is conducted by the Presbyterian Board of Missions. They have a neat and comfortable church, a resident missionary, and services are held regularly. The attendance is small. There is no church organization. The Winnebagoes are not a religiously inclined people and missionary work among them is discouraging. The Sabbath school connected with the church is, during the session of the Winnebago Industrial School, well attended, as the school furnishes over sixty scholars, and is doubtless doing much good.

Crime – Marriage relations. – But little crime has been committed during the year, and all have been of a minor nature, for which there has been but one conviction and that for assault and battery. Circumstances have been against punishment of minor crimes, as we have had no State officer within 20 miles of the agency. We have now a resident justice and can bring offenders to justice. Especially will this be valuable in cases of drunkenness.

The moral status of the Winnebagoes, especially as regards the marriage relations, is anything but what it should be. The practice of assuming and dissolving the marriage relations at will, without form or law, is common. It has been the custom of these people from the earliest history, and is a vice difficult to remedy. Outside of the moral question it will necessarily cause these people an endless amount of trouble in the future as regards the law of descent, as it will be impossible to determine who are legal heirs to property. I most earnestly recommend that all of the power which this General Government yet retains be exerted to suppress and wipe out this practice.

Whisky can be procured by Indians at most of the towns adjoining the reservation, and so far it has been impossible to prevent its sale to them. Every case of a such illicit sale coming to my knowledge has been reported to the Federal court authorities. In two cases the guilty parties were convicted and fined $1 and costs each. Such slight punishment inspires no fear, and without the hearty co-operation of the Federal courts we can do little. Two parties are now under bond to appear before the United States district court.

[139] *Sanitary condition* during the year has been good, except during the visitation of epidemic catarrh, which was very severe and fatal among the Indians, and the death rate is consequently high; sixty have died during the year. During the catarrh epidemic the honorable Commissioner granted me authority to expend the sum of $50 in the purchase of

food for the sick. This was expended under the direction of the agency physician, and was of great benefit, and I am convinced that it would be wise to set apart a moderate sum each year to be used in procuring food for the sick. Indians are not prepared for emergencies of this kind, and consequently suffer when sick or infirm. I would recommend that a portion of the funds heretofore paid them as cash annuities be used for this purpose.

Annuities. – The small cash annuities paid the Winnebago Indians is in my opinion of little actual benefit to them. The larger part is wasted or worse. If it is to be paid them at all it should be during the latter part of the winter, when their other means of subsistence is exhausted. If it can be done I think much more good would result by using the money in establishing them on their allotments.

Agency buildings. – The agency buildings are in a fair condition, but require some repairs to make them comfortable. These repairs should be made before cold weather. The water supply is a serious question for reasons mentioned in report of Winnebago school.

Shops and mill. – Good, work has been done in the shops during the past year. A great amount of repairing has been done for the Indians as well as some new work. The carpenter and blacksmith are both Indians, but the work will compare favorably with that of their white neighbors.

The grist-mill is in a fair state of repair and does good work for the old style of mill. It has done quite a

large amount of work during the year for the Indians besides grinding all the flour for both the Winnebago and the Omaha schools. The saw-mill was kept busy during the spring and early summer; 103,000 feet of lumber was manufactured for the Indiana and the Department.

Employés. – My employés have been faithful and efficient and all of them have been fully employed.

OMAHA INDIANS.

Outside of having charge of the schools, my duties as agent are only nominal as regards the Omaha Indians. They have no employés. The shops and mill were abandoned some years since and issued to the Indians. The wisdom of this move I question, as the shops while in operation were of great benefit to them, and the cost of keeping them up money well expended. The Omaha Indians are doing fairly well, but they much need the counsel, encouragement, and supervision of an agent. I have given them quite a large portion of my time, and the attention which their affairs requires has added much to the clerical work of this office.

The Omaha Indians occupy almost the same spot they did in 1804 when Lewis and Clarke first explored the Missouri Valley. They have always been a quiet, peace-loving people, and easy to control. They are not possessed of all the energy one could wish, and they consequently require pushing and

encouraging. A number of them have good farms opened and are progressive.

The census just completed shows as follows:

Total population	1,173
Number of males above eighteen years of age	567
Number of females above fourteen years of age	606
Number of school children between six and sixteen years of age	321

Allotments. – Of the 133,840 acres in the reservation 57,649 have been allotted to 954 individual allottees. There are 210 houses on the reservation occupied by Indians. One Indian has been assisted during the year from the general fund, "Aiding Indian allottees," to the extent of $250.

I would here refer to what I have said in relation to leasing of Winnebago Indian lands. The same circumstances and facts exist as to the Omahas, and the same remedy is suggested.

Agriculture. – The cultivated acreage on the Omaha Reservation has been increased 1,750 acres during the past year, but this land has almost all been broken by white men under some kind of lease. The crops are about the same as reported of the Winnebagoes, much below the average. Especially is this true of the corn. It was not planted in season and has not been properly attended and will be poor.

Citizenship. – The Omahas are divided in opinion as to the value and benefit of citizenship, the non-progressive party holding out against it, the progressive acknowledging the benefits and exercising its privileges. The feeling on this question is pronounced, but I am convinced that the progressive will in time overcome the opposition, and that all will acknowledge it to be beneficial to the race.

[140] *Annuities.* – The Omahas have just received the last payment of $35,000 under act approved May 15, 1888, making $70,000 that has been paid them within the last eighteen months. The use made of this money Special Agent John C. Spencer, who has made this last payment, will report. How the Omahas will live and what the result will be of the Government relinquishing charge and control of them is a question which is yet to be answered. So far the large payments received have been quite a factor.

Education. – The Omahas are provided with ample school facilities, which they appreciate to a certain extent, and year by year improvements in this respect can be seen. As with the Winnebagoes, the children attending school are mostly the younger ones. This is mainly due to the fact that many of the children attend other institutions of learning.

Omaha industrial boarding-school; building owned and school supported, by the Government. – This school is located at what was the Omaha Agency. The boarding-house and dormitory have been replastered, the floors, doors, windows, and porches repaired, and

the building thoroughly renovated throughout. A storehouse, hog and chicken houses, addition to barn, a physician's office, and new school-house erected; this, with a system of water-works, puts this school premises in good condition. All of the above were much needed repairs and additions. The old school-house was located a long distance from the boarding-house, and was also in bad condition and unfit for the purpose. The boarding-house was not originally intended for the purpose for which it is now used, but with the repairs is comfortable; it is not a model building of its kind. All of the above additions will be completed this quarter, and everything necessary for the opening of the school September 1 is now completed. The average attendance during the past year has been 58; age, 12.4 years. As with the Winnebago school, I am much pleased with the progress made during the past year, and with the additional facilities and the benefit of this year's experience by superintendent and employés, I look forward to a most prosperous and successful school year.

The farming connected with the school has been successful, considering the character of the season. Twenty-five acres of new breaking have been added to the school farm, so that in the future we will have all the land required.

The employés are faithful and efficient. This school can well and properly accommodate 65 pupils. I have already recommended the establishment of shops (carpenter and blacksmith) in connection with the school, and think it would be wise. I would make

the same recommendation in this connection that I did in speaking of Winnebago schools, with regard to paying for work done by the pupils.

Omaha Creek day school; building owned by Presbyterian Board of Home Missions, and schools supported by Government. – This school was opened by direction of the honorable Commissioner in May last. It is located 10 miles west of the Omaha industrial school. As this school has been in session only a short time, I am unable to give a detailed report, but I consider the teacher competent and earnest, and that if enough pupils can be secured it will be a success. Forty pupils can be accommodated.

Omaha Mission industrial boarding-school (contract). – This is a contract school under the management of the Presbyterian Board of Home Missions. The average attendance during the year has been 32.5. The building, although old, is in fairly good repair. The care taken of the children is excellent. Fifty pupils can be properly accommodated.

Crime, morals, marriage. – Very little crime exists at present among the Omaha Indians, and their morals are good. They respect the marriage relation, and family ties are recognized. They were formerly polygamists, but of late years this evil practice has been dying out, and there are at present on the reservation only eleven cases of polygamy.

Missionary work. – The Presbyterians have for many years labored among this people, and with good results. They have a church organization with a

membership of 100 Indians, two resident missionaries, two church buildings. Services are held regularly and are well attended. This feature of the work is encouraging.

SUMMARY OF RECOMMENDATIONS.

That the law in relation to the leasing of allotted land be changed so as to allow leasing under proper restrictions.

That the children at the industrial schools be compensated for labor.

That a more reliable water supply be secured for the Winnebago school.

Repairs for agency buildings.

That food be provided for the sick and infirm to be expended under the directions of the physician.

That cash annuities be discontinued and funds used in aiding allottees and opening farms.

That an assistant industrial teacher be allowed at the Winnebago industrial school. That carpenter and blacksmith shops be established in connection with the Omaha industrial school.

Census and full statistical reports of agency and schools I forward herewith.

[141] CONCLUSION.

I have been individually acquainted with the Indians under my charge for over thirty years, twelve years of which time I have resided among them. I feel that to a degree I understand them; I know that I have their best interests at heart. I do not feel entirely satisfied with the year's work. All the progress and improvement that I had hoped for has not been realized, but I feel sure that some good has been accomplished. Much-needed improvements have been made in the school building, and we start in with a bright prospect for a successful school year. If these people are ever brought to be the true enlightened American citizens that we hope to see them, it must be through the influence of the schools. With this in mind I have spared no pains or labor to render the school system practical and complete.

With many thanks for the kind indulgence and courtesies extended by your officer I am,

Very respectfully, yours,

ROBERT H. ASHLEY,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

* * *

[304] REPORTS OF AGENTS IN NEBRASKA.

REPORT OF OMAHA AND WINNEBAGO AGENCY.

OMAHA AND WINNEBAGO AGENCY, NEBR.,
September 1, 1892.

SIR: I have the honor to submit herewith my third annual report, with the census of the Indians at this agency and statistical information.

The reservation. – This reservation is located on the eastern border of Nebraska, and embraces, with the exception of a portion that has been sold, the entire county of Thurston. It is bounded on the east by the Missouri River, is 18 miles from northern to southern limit, and extends west 30 miles, containing 245,200 acres of the finest agricultural lands, well watered, with an abundance of timber. It is intersected by railways and surrounded by flourishing towns, which afford the best of market facilities, rendering it one of the most desirable portions of the State.

The northern portion is occupied by the Winnebagoes, who acquired it by purchase from the Omahas in 1865, who yet occupy the southern and larger portion of the reservation.

Agency. – The agency headquarters for the two tribes is located in the eastern portion of the Winnebago Reservation, but quite central as to the Winnebago population, and 10 miles distant from the old and abandoned Omaha Agency.

The agency buildings are in a fair state of repair, and provide comfortable quarters for the employés. Additional room is required for the proper housing of the farm machinery. The addition this season of six self-binders, one threshing machine, besides mowers, rakes, planters, etc., renders this necessary, and an estimate has been submitted for the building of a storehouse in the western portion of the reservation, 20 miles distant from the agency. This will provide for the machinery in use in that portion of the reserve, save the trouble and expense of transportation, and relieve the overcrowded agency warehouse.

The gristmill, while the building is good, is only provided with old and out-of-date machinery with which it is impossible to make flour of quality equal to that produced by the mills adjoining the reservation. It should either be supplied with new machinery or its use discontinued. In March last I procured an estimate from a mill expert of what would be required to make this a modern mill and submitted the same for the consideration of the Department.

Population. – The population of the two tribes, according to the census of June 30, 1892, is as follows:

Winnebagoes –

Total population	1,498
Males above 18 years	389
Females above 14 years	400
Children between 6 and 18	273

Omahas –

Total population	1,186
Males above 18	293
Females above 14	368
Children between 6 and 18	323

Owing to the many dissimilar conditions of the two tribes composing this agency – speaking an entirely different language, unlike in character and habits – they will be treated separately in the remainder of this report.

WINNEBAGOES.

Location. – When the allotment of lands in severalty was made to the Winnebago Indians they were living in the eastern and timbered portion of the reservation which is quite rough, and where in general only small tracts of good agricultural lands can be found. They then considered that it was of much more importance to have fuel within easy access than to have fine, level fields for farming, and the allotment was therefore made so that almost every family has 40 or 80 acres in this portion of the reservation, the balance of each family's allotment being in the central and western part of the reservation. Prior to 1889 little of the western two-thirds of the reservation was occupied or made any [305] use of by this people, except to lease for grazing purposes for a consideration so small that it was practically valueless.

Houses. – All the houses that had been erected for the Winnebagoes up to the time I took charge of this agency in 1889 were located on the eastern, and, as before stated, least valuable portion of the reservation for agricultural purposes, and the great aim of my administration has been to induce as many as possible to move out of the timber on these splendid lands and open up farms. I have applied to the Department for all the means available for the assistance of those who took hold and showed a disposition to help themselves, and I feel that I have been fully supported by the Department, and that all the aid possible has been furnished. Upon the completion within a few weeks of the sixteen houses authorized this season, I will have provided twenty-seven allottees, with good, comfortable houses, besides five others who have been assisted to the extent of $100 in completing their houses.

I yet feel very hopeful for the future of the Winnebagoes, largely owing to the fact that so many have opened up farms and are well started on the road to industrious and prosperous citizens. Most of those who have been assisted are doing fairly well. Some, however, tempted by the offers made them, have leased and abandoned their farms, returned to the timber and are living in idleness. The importance of enforcing the law of February 28, 1891, in relation to leasing of allotments, and the Department rulings under the law can not be overestimated. I have no doubt of the wisdom of continuing the policy pursued by the Department for the past three years in using

all the means available in assisting those who will take hold and help themselves. It must, however, be expected that not all will prove worthy; but taking the situation as a whole I think the prospect for the future Winnebagoes is very encouraging.

Allottees have been aided during the past year as follows: 16 new houses erected, 16 horses, 21 wagons, and 7 sets of harness issued. Threshing, mowing, and reaping machines, plows, rakes, etc., have been supplied, but are yet held as agency property, and in addition to this 89 houses have been repaired. In 1890 the condition of these houses was reported to the Department. They had been built by the Government at a very large expenditure, and unless repaired would soon be a total loss. In August last authority was granted for the repairs, and at this date the work is about completed at an average cost of about $100 each, including plastering, and painting inside and out, making them very comfortable and preventing a great waste of property.

Agriculture. – The cultivated acreage on the reservation has been increased by 900 acres of new breaking, and this does not include the 10,000 acres broken by the whites who have leased of the Indians. Crops in general have been good; wheat, oats, and corn about an average; potatoes poor, owing to dry weather, and flax almost an entire failure. Seed, grain, and potatoes have been issued as follows:

	Bushels.		Bushels.
Wheat	1,500	Flax	500
Corn	500	Potatoes	500

Education. – The provision made for the education of the Winnebagoes has been ample up to the 23d of February, at which date the Winnebago industrial boarding school building was destroyed by fire. This was the greatest disaster that has ever occurred at this agency, and the resulting sorrow and discouragement was only lessened by the fact that no loss of life occurred, and the accident was not the result of carelessness or negligence on the part of the employés. These buildings destroyed were quite old, but had been put in good repair and everything was in fine working condition at the date of the fire, with the school filled to its full capacity, and but for the disaster the year would doubtless have been the most successful in the history of the school. After the burning of the school buildings temporary quarters were found in the agency farmhouse and a small school run until the close of the school year.

Advertisements are now out for the letting of contract for rebuilding this school on better plans and with more ample room, but owing to the lateness of the appropriations by Congress the building can not be completed before next season. By a small expenditure for a temporary building we hope to be able to accommodate fifty children, which, with those who can be induced to attend other than reservation schools, will provide for the larger part of those who can, be induced to go to any school. The accompanying

report of Superintendent Atkinson will give quite full information of the condition of this school.

Missionary work. – The missionary work here is confined to the one denomination [306], the Presbyterian, who have a resident missionary, and a neat, comfortable church with a membership of eleven Indians.

Morals and crime. – Nothing of importance in the way of crime has been committed during the past year, and I think a decided improvement in the condition of morals can be noted. The marriage relations have been less often violated and fewer cases of drunkenness have come to my notice.

Sanitary. – I herewith submit the report of the agency physician as to the sanitary condition of the agency and school.

Employés. – But one unimportant change, that of assistant carpenter, has been made in the force of agency employés during the past year. In the main I consider that good service has been rendered, and that the employés are capable, and in character a credit to the service. With the past experience the most efficient service may be expected for the coming year.

The additional duties incumbent upon me in assuming charge of the leasing of the unalloted lands of both tribes has vastly increased the clerical work in the agency office and the regular per diem assistance, which has been allowed, is insufficient, and in justice

to myself and clerk I consider that a regular assistant should be allowed for this agency.

Agency police. – The Indian police force, 1 captain and 7 privates, have given good satisfaction and have been well employed in looking after depredations on Government timber, and keeping whisky off the reservation. As to the latter I think they have been much more successful than in any former year.

OMAHAS.

Condition. – Nominally the Omahas are supposed not to be under the charge of an agent, and that his duties as regards them are simply confined to the school and the payment of annuities, the agency having been abandoned and the employés done away with some years since; but as a matter of fact the agent's and office work connected with the Omahas for the last year has exceeded that for the Winnebagoes and for which no adequate provision has been made in the way of office assistance. The general condition of the Omahas is about the same as when last reported. Little, if any, improvement can be noted, and in some respects I am obliged to say the change has been for the worst. Especially is this true in respect to the use of intoxicants, which has increased to an alarming extent. I am pleased to say that the better element are now awake to the extent of this evil and are making an effort among themselves to stamp it out. They have even gone to the extent of requesting that a large fund be set aside

from the moneys coming to them from the leasing of the tribal lands for the prosecuting of those engaged in the business of furnishing them whisky, and we may hope for a better condition if they continue in this spirit.

The Omahas have received during the past fiscal year in annuities $26,700, which, with the $116,400 paid them last year and the revenue derived from leasing their tribal lands and their individual allotments, is enough to enable them to live without exertion on their part. As a result the area of land cultivated by them has decreased rather than increased, as could reasonably be expected from the large addition to their means.

Leases. – Prior to this season it has been the custom of the Omahas to lease the large tract of unallotted and tribal lands for grazing purposes. The business has been conducted by a council or committee appointed by the tribe for this purpose, but not sanctioned by the Department or agent, and without authority of law, though the business has been done in a fairly businesslike manner.

On the 15th of February last I was instructed by the Department to take charge of the leasing of the tribal lands under the provisions of the law of February 28, 1891. The carrying out the instructions of the Department has been a very laborious and difficult task, partly owing to the indefinite manner of describing the pasture boundaries in former leases, and the very large number of small leases that have had to be

made. Nevertheless the authorized leasing is very much more satisfactory to all parties interested, and the revenue derived from these lands this season will be about $11,000, almost double that received any previous year. The same conditions in relation to the leasing of the allotted lands of the Omahas exist as has been reported of the Winnebagoes, with the exception that a larger per cent of the Omahas are living on their allotments in the western portion of the reservation and yet retain unleased a part of their allotment; but the total per cent of the Omaha lands leased is about the same as with the Winnebagoes, and the necessity of a new order of things and a strict [307] enforcement of the law in relation to leasing of allotted lands is just as important with the Omahas as with the Winnebagoes.

Education. – The provision made for the schooling of the Omaha children is ample, and during the past year very few children of school age but have been in school. It has, however, fully taxed the capacity of the Government school to provide for all that wished to attend.

Omaha Industrial School, boarding. – The past has been a very successful year for this school, and I feel on the whole that the work has been good. The children have been unusually happy and contented, and we have had little trouble to keep the attendance up to the full limit.

The carpenter and blacksmith shops, which were opened at the beginning of the school year, have done

well, and I note with pleasure the progress made by those of the boys who have received industrial training during the year. If the same boys can be kept in this school for a few years the Omahas will have among themselves some very competent mechanics.

With the repairs of this and last season the buildings are in very good condition, and at this date we are prepared to open the school with the brightest prospects of the most successful year in the history of the school. The report of Superintendent Watson of this school is herewith submitted.

Omaha Mission Boarding School, contract. – This school is under the management of the Presbyterian Board of Home Missions. At the opening of the year we had much trouble in procuring children for this school. This was in a measure owing to the fact that a change had been made in the management, and the superintendent and all the employés were strangers to the Omahas; but during the latter part of the school year a fair attendance was obtained and a very successful school conducted. I can only speak in the highest terms of both superintendent and employés, and think that in the future there will be little trouble in having a successful school and good attendance. After the burning of the Winnebago school buildings quite a number of Winnebagoes were induced to send their children to this school and were well pleased, so that we are in hopes that during the coming school year, considering the limited accommodations at home, we can increase the number of Winnebagoes in this school.

The statistical information furnished as to the Omahas is in part estimate, as with no agency employés it is impossible to obtain positive data; but I think the figures given are fairly reliable.

CONCLUSION.

For the agent the past year has been one of unusual cares and responsibilities. Many vexatious questions have arisen, as of necessity there must in the new order of things, such as the conflict of national and State authority over the lands and property of the Indians, and claims for tribal membership denied by the Department and carried into the courts, all involving much work and adding to the agent's responsibility.

In making this annual review of the year's work I can see much to encourage in some directions at least. Though not all we hoped for and the progress slow, still I do feel that each succeeding year will show more marked improvement. My long acquaintance with this people, extending over thirty years, gives me great personal interest in them, and my great desire to see in them a rapid improvement in all that goes to make the good and prosperous citizen may have unduly influenced to the discouragement that I at times feel.

I have no doubt of the wisdom of the policy now pursued by the Department in giving first importance to the education of the youth, and then in using all available means in assisting allottees, who will go to

work to open up farms. Much time and the best directed efforts will be required before the desired results can be obtained.

I beg to express my thanks to the honorable Commissioner and all other officers of the Department for the courtesy extended to me in all of my official transactions.

Very respectfully submitted.

ROBERT H. ASHLEY,
U. S. Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

---

* * *

[178] REPORTS OF AGENTS IN NEBRASKA.

REPORT OF OMAHA AND WINNEBAGO AGENCY.

OMAHA AND WINNEBAGO AGENCY, NEBR.,
August 24, 1897.

SIR: In compliance with instructions contained in your letter of June 1, 1897, I have the honor to submit herewith the following report of the affairs of this agency, together with required statistics.

Having taken charge of the agency on June 20, 1897, I have not had time to familiarize myself with the needs of the Indians or the condition of affairs here to the extent that I am ready to make any recommendations or suggestions, but will make special reports from time to time, as I become familiar with the needs of the agency.

Location of agency, area, timber, water, and character of soil. – The Omaha and Winnebago reservations are located in the northeastern part of Nebraska, and embrace all of Thurston County, except a portion of the reservation which has been sold and is now occupied by the white purchasers. They are bounded on the east by the Missouri River, 18 miles from northern to southern limits, and extend west 30 miles, embracing one of the finest tracts of agricultural and grazing land in the State. The eastern portion is fairly well timbered with valuable varieties of hard woods native to this section. The central and western portions are made up of gently rolling prairies, wide and fertile valleys, well watered by the Logan, Omaha, and Blackbird creeks and their branches, and possessed of the finest soil. The Winnebago tribe of Indians occupy the northern portion, containing about 11,000 acres, and the Omaha tribe the southern, containing about 133,000 acres.

WINNEBAGOES.

Census. – The population of the Winnebago tribe, according to the census prepared recently, is as follows:

Total population	1,153
Males	583
Females	570
Males over 18	372
Females above 14	389
Children between 6 and 16	238

Education. – The Winnebago Boarding School has been well managed during the past year and the results from the year's work have been gratifying. A good general average has been maintained throughout the year, with an enrollment of 111 at the close of school.

These Indians, like all others, greatly prefer to send their children to the agency rather than to nonreservation schools.

There are five district day schools on the reservation, two of which have had contracts with the Government for the instruction of Indian pupils. General satisfaction seems to have been given by these schools, some of the Indians preferring to send their children to the day schools rather than to the Government boarding school.

Farming. – There has been a slight increase over last year in the breaking up of lands, but some of those cultivated by Indians last year were leased this season. A large acreage was planted this year, but it is reported by the Government farmer that owing to unfavorable weather in the spring the yield of small grain is light; the corn is looking very fine, but there is still some danger from frost. A number of Indians have recently signified their willingness to farm if they could be assisted by the Government in the way of good horses and the use of farm implements. Most of the farm machinery issued to them a year or two ago is unfit for service, and they are particularly in need of mowing machines. The few serviceable

machines at the agency are now in constant use during the haying season, and many neglect to provide enough hay for their stock through the winter for the reason that they have no machines of their own and are unable to borrow the Government machines at the proper season.

Leases. – There are about 375 approved leases of alloted lands on the Winnebago Reservation in force, while many more white renters are actually occupying lands without approved leases. Nearly all the Winnebago Indians have their allotments, or at least a portion of their land, leased to white settlers. There are also 80 leases of tribal lands on this reservation in force.

[179] **Morals and crimes, marriage.** – There is a marked public sentiment against the looseness of the marital relations of the Winnebagoes. The practice of assuming and dissolving the marriage relation at will, without form of law, is common. It has been the custom of these people from the earliest history, and is a vice difficult to remedy. Outside of the moral question, it will necessarily cause these people an endless amount of trouble in the future as regards the law of descent and in determining the legal heirs to property.

Allotments. – The manner in which the allotments to the Winnebagoes were made, namely, 160 acres to the husband and nothing to the wife, has been and will continue to be a source of great trouble. Thus, a woman who happened to be encumbered with

a husband at the time the allotments were made, obtained no land in her own name. The law, I presume, intended the 160 acres for the husband and wife for a home; but as soon as the Indian becomes tired of his wife he leaves her, which constitutes an Indian divorce without further ceremony, and the deserted wife remains without land or means of supporting herself and children.

Sanitary condition. – The physician for the Winnebagoes, Dr. W. J. Stephenson, was transferred to this agency in May last and does not feel sufficiently familiar with the conditions which have existed previous to his arrival to report at any great length. He reports, briefly, as follows:

> Since arriving at the reservation in May, 1897, I have visited Indians at their homes and rendered service to others at my office. The prevailing disease is tuberculosis, which is slowly but surely solving the Indian problem. With the exception of chronic troubles, a few cases of malarial fever, and the usual bowel troubles attendant upon the hot weather of summer, these Indians have enjoyed comparatively good health since my arrival in May last. There was an epidemic of measles last winter, and several deaths occurred from the disease itself and complications. At the present time the sanitary condition of the Indians is good.
>
> The system now in vogue of leasing an Indian's entire allotment, including in many cases his comfortable house, erected at

Government expense, deprives him of the use of the house in winter, and for this reason many Indians who have houses on their allotments do not occupy them, but live in tepees or huts. This condition of things may not be detrimental to their health in summer, but it is certainly not a good state of affairs for winter. With two or three families crowded into a hut or tepee 10 by 12 feet in size, where no ventilation whatever is provided and the impure air is breathed over day after day, there is every opportunity for disease to originate and spread, while it can not be successfully combatted under those conditions.

OMAHAS.

Census. – The population of the Omaha tribe, according to the census recently completed, is as follows:

Total population	1,170
Males	590
Females	580
Males above 18	290
Females above 14	336
Children between 6 and 16	227

Education. – The Omaha Boarding School has been satisfactorily conducted during the past fiscal year, with an average attendance of 87. The capacity of the school is about 85. There is urgent need of a steam heating plant, in place of the wood stoves now in use, the present arrangement being dangerous and

unsatisfactory. A new dormitory for the school, to enlarge the capacity to meet the increasing enrollment, is a necessity, and this matter will be taken up in a special report as soon as practicable. Report of the superintendent of the school is transmitted herewith.

There are three district day schools on the reservation of which two have had contracts with the Indian Office for the instruction of Indian pupils during the last year. So far as I am able to learn, they have given good satisfaction.

Farming. – The Omahas have not increased largely the area of their farm holdings themselves; they find it easier to obtain money by leasing their lands. The majority do not seek to farm further than that which is absolutely necessary. There are some good farmers among them, but they are the exception and not the rule. Nearly all have houses, plant a small piece of ground, principally to corn, and raise a few vegetables, barely sufficient, however, to keep them through the winter.

Leases. – Nearly all the Omahas have leased their lands under Department regulations. A great many of the leases, however, remain in this office incomplete, having been held here by my predecessor, awaiting the action of Congress on the subject of leasing, or for other reasons.

Crime, morals, marriage. – The Omahas respect the marriage relation, and family ties are

recognized. There are still a few polygamous marriages, but this evil practice is gradually dying out.

[180] GENERAL REMARKS ON BOTH RESERVATIONS.

Field matrons. – The work of the field matron on the Omaha Reservation has been satisfactory during the year. A summary of her work shows that one hundred and twenty-five days have been devoted to visiting 186 Indian families at their homes: giving general instruction to all visited in the manner of preparing food and cleanliness; special instruction to 56 in the cutting and making of garments; and that medicine was given to about 100, and special instruction given to 50 mothers in the care of sick babies and children. Her home is always open to young people for singing and social gatherings, and her aid is also cheerfully furnished and encouragement given in work of Christian Endeavor and temperance societies.

A field matron has also been appointed recently for the Winnebago Reservation, and it is believed that much good will result from faithful work in this direction.

Liquor traffic. – The sale of intoxicating liquor to Indians of this agency, which has, in spite of the efforts of the agent, been carried on openly by saloon keepers in adjoining towns and even extended to the reservations by the "bootleggers," will be noticeably checked in the near future as soon as the grand jury meets and a suitable punishment is inflicted on a

number of the offenders who have already been arrested. The act of Congress approved January 30, 1897, provides a suitable punishment for the introduction of liquor into the Indian country or sale to Indians, and a vigorous campaign has been commenced against offenders and will be continued until a proper respect for the law is shown. Heretofore it has been impossible to inflict proper punishment for this offense, owing to the lack of suitable legislation on the subject.

Indian freighters. – The Indians are good freighters; they keep their loads dry and open no packages. During the past year they transported with their own teams all the goods and supplies furnished under Government contract for the agency and schools.

Indian police. – The United States Indian police force of this agency consists of 1 officer and 16 privates. They furnish their own horses, and have performed commendable service in the suppression of the liquor traffic, guarding of warehouses and agency buildings, returning runaway pupils to the schools, etc.

Missionary work. – All the missionary work of this agency is conducted by the Presbyterian Board of Missions. They have comfortable buildings and services are held regularly. The Winnebagoes are not a religiously inclined people and the attendance at Winnebago Reservation is small. On the Omaha

Reservation they have a church organization and the meetings are fairly well attended.

For further report I respectfully refer to the inclosed statistics.

Very respectfully,

W. A. MERCER,
Captain, Eighth Infantry, Acting Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SUPERINTENDENT OF OMAHA SCHOOL.

OMAHA INDUSTRIAL BOARDING SCHOOL,
Omaha and Winnebago Agency, Nebr., July 24, 1897.

SIR: I have the honor to submit my second annual report of the Omaha school for the fiscal year ended June 30, 1897.

This school has been very prosperous during the year. The attendance, which was constant with but few exceptions and these for good reasons, was as follows: First quarter, 72; second quarter, 93; third quarter, 91; fourth quarter, 95. Runaways were very infrequent and the improvement in the general discipline of the school has been marked. The services of the Omaha police were very creditable and exceedingly helpful in many ways.

The visiting of the pupils by their parents has been regulated, and law and order, with a wholesome respect for authority, have been inculcated.

The improvements in the plant have not been extensive, but they have been of a very substantial character, and have added much to the appearance of the plant and to its effective workings. They are as follows, viz: Oil house, 10 by 10 feet, brick, cement floor; outhouse (employees') 6 by 8 feet, brick, draw tank; outhouse (boys') 6 by 12 feet, brick, draw tank. A cement floor was put in the basement of the main building. One hundred and fifty square yards of cement walk was made. The interior of the schoolrooms was put in excellent condition. In the main building badly worn floors were replaced by new ones and the entire building was thoroughly renovated.

Twelve rods of board walk was laid; 60 rods of board fence was built and painted; 250 rods of wire fence was built. A natural water course, which caused much trouble after heavy rains, was changed in its course by a ditch. Considerable grading has been done on the yards.

The water system has been improved. A John base heater and boiler were purchased and a "ring system" of baths located in the basement of the main building.

A piano was purchased for the school during the year. Some of the pupils have made marked progress in music, and the instrument has been a source of much gratification to the entire school. A sitting room has been provided for employees and their guests. This has been neatly furnished, and is much appreciated. The roofs of the main buildings were painted.

No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX, VOLUME IV

JAMES D. SMITH
Solicitor General
of Nebraska
OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov
Counsel of Record
for Petitioners

DONALD B. VERRILLI, JR.
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel of Record for
Respondent United States

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Avenue, N.W.,
Seventh Floor
Washington, D.C. 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel of Record for
Tribal Respondents

Petition For Certiorari Filed May 27, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

VOLUME IV

Report of Omaha and Winnebago Agency August 24, 1901, filed June 24, 2013 840

Report of Omaha and Winnebago Agency August 24, 1903, filed June 24, 2013 858

Expert Report submitted by R. David Edmunds, Ph.D., filed July 12, 2013.....874

Letter from Clark W. Thompson and E. M. Furnas, Special Commissioners, to Wm. Dole, Commissioner of Indian Affairs dated March 10, 1865, filed July 12, 2013 1012

Letter from Commissioner to N. G. Taylor, Council Indian Affairs, Department of the Interior dated October 7, 1867, filed July 12, 2013 1013

1865 Treaty with the Omaha, filed July 12, 2013 1014

1854 Treaty with the Omaha, filed July 12, 2013 1019

Excerpts from Deposition of Emily Greenwald, Ph.D. taken August 8, 2012, filed July 12, 2013 1029

Historical Summary for Omaha Reservation dated November 30, 1961, filed July 12, 2013 1065

Excerpts from the Annual Report of the Secretary of the Interior for the Year 1896, filed July 12, 2013 1073

TABLE OF CONTENTS – Continued

Page

Report of Omaha and Winnebago Agency September 18, 1885, filed July 12, 2013 1075

Presbyterian Missionary Letter from John Copley to J.C. Lowie dated January 20, 1885, filed July 12, 2013 1079

Presbyterian Missionary Letter to Rev. John C. Lowie dated March 23, 1887, filed July 12, 2013 1081

Letter from the Secretary of the Interior to Congress dated February 10, 1888, filed July 12, 2013 1084

Excerpts from the Annual Report of the Department of the Interior for the Year 1897, filed July 12, 2013 1088

Excerpts from the Annual Report of the Department of the Interior for the Year 1899, filed July 12, 2013 1099

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jun. 24, 2013)

[268] REPORTS CONCERNING INDIANS IN NEBRASKA.

REPORT OF AGENT FOR OMAHA AND WINNEBAGO AGENCY.

WINNEBAGO, NEBR., *August 24, 1901.*

SIR: In compliance with the rule of the Department, I have the honor to submit herewith my third annual report of affairs at this agency.

The Omaha and Winnebago Agency is located near the eastern limit of the Winnebago Reservation, 20 miles south of Dakota City, Nebr., which is on the Chicago, St. Paul, Minneapolis and Omaha Railway, from which point supplies are hauled to the agency. Dakota, City is also the telegraphic address of this agency. Up to this date we have depended upon the mail for the delivery of telegrams from Dakota City, and often the delay is such that letters mailed at Washington will reach us in the same mail as telegrams forwarded the same date. I am pleased to note, however, that arrangements have now been completed for the extension of the telephone line to this agency.

The Omaha and Winnebago Reservation contains 250,000 acres. This was originally all Omaha lands, but in 1865 the Omaha sold to the Winnebago 98,000 acres, [269] and later, in 1874, 12,000 acres more, so

that now the Winnebago Reservation contains 110,000 acres, and the Omaha 140,000 acres. Taken as a whole, the reservation is one of the finest tracts of agricultural land in the State of Nebraska. A small tract of rough land bordering the Missouri River on the east is fairly well timbered, affording abundant fuel supply. The balance of the reservation is made up of the valleys of the numerous streams passing through the reservation and moderately rolling prairie.

The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and forms the southwestern boundary of the Omaha Reservation. There are four railway stations on or joining the reservation, giving the best of market facilities for that part of the reserve.

Agency buildings. – The buildings at this agency are old, most of them having been erected in 1865 and 1866, when the Winnebago Indians were removed to Nebraska. They are in fairly good repair and afford comfortable quarters for agent and employees. The most serious fault is the poor water supply, the agent's dwelling and three of the employees' houses being entirely dependent upon water hauled by team. If the appropriations will admit, this serious trouble should be eliminated at the earliest possible date.

The business at this agency pertains as much to the Omaha as to the Winnebago. The agency is located on the Winnebago Reservation, 10 miles distant,

from the Omaha school and the old Omaha Agency, in which vicinity the Omahas largely reside. To facilitate the transaction of business with the Omaha, such as executing leases, collecting and disbursing rentals, one day at least each week is spent by the agent and two clerks at the Omaha school. The only room available in which to transact this business is the school physician's office, which is much too small for the purpose. We have at the Omaha school a building erected for school shops. Only a part of this building is now required by the school, and at a very small expense the unused portion could be converted into a comfortable office. With so much business to transact with the Omaha I consider this would be a wise expenditure.

Census:

Omaha –		
Males of all ages	623	
Females of all ages	580	
Total		1,203
Children of school age	334	
Increase of population during the year	21	
Winnebago –		
Males of all ages	596	
Females of all ages	535	
Total		1,131
Children of school age	303	
Decrease of population during the year	28	

Allotments. – The allotting of the Omaha lands was practically completed in January, 1900, a few

unsettled claims for allotment only remaining for adjustment. Practically all the Omaha lands are now disposed of, except certain tracts held pending the decision of suits now in the United States court where certain parties claim to be of Omaha blood and entitled to an allotment.

Special Agent John K. Rankin completed the Winnebago allotment early in the present year. His task has been a very difficult and perplexing one on account of the many conflicts in the two previous allotments. The work, however, has been very carefully done and has given general satisfaction. Only a very small amount of tribal land remains unallotted, and the few remaining tracts will doubtless be required in the adjustment of a few pending claims for allotment.

Leasing. – The leasing of the very large amount of surplus allotted lands on this reservation – the collecting and disbursing of rentals – not only involves a vast amount of labor but is a very vexatious and difficult task, involving as it does the determination of heirships to lands, the evidence to determine which is often vague and conflicting. There is, and always must be, a very large surplus of lands on this reservation that must either be leased or allowed to go to waste. If every man, woman, and child enrolled with these people, counting in all who are permanantly absent from the reservation, should cultivate an average of 20 acres each they would use up but 50,000 acres, leaving as a surplus 200,000

acres. This surplus is practically all good agricultural land. It is now largely under lease and in cultivation.

The wisdom of permitting any leasing of allotted lands has been questioned, and [270] it is doubtless true that reasons exist for this view; but the conditions at this agency justify me in saying that there can be no question of the wisdom, justice, and absolute necessity of continuing the policy now in force or some other that would accomplish the prime object, viz, that the aged and helpless men, women, and children shall derive from the land held by them in severalty the largest possible income for their support, an income without which they must exist in absolute want. The 200,000 acres of this reservation in excess of what we can reasonably expect the able-bodied men to cultivate is largely, the property of this helpless class.

The laws and rules governing the leasing of Indian lands are now well understood, and a much better class of renters is secured than formerly. The rule requiring certain improvements in addition to cash rentals is wise; but I am sure that a modification of this rule, so that in certain cases a portion of the rentals derived from the part of an allottee's holding under lease should be applied to permanent improvements on the part of the allotment retained and occupied by the allottee as a home would in many cases result in more permanent benefit than the rules now applied. Many of the tracts now under lease have all the improvements required, while the home place buildings require repairs or that new buildings be

erected. Especially among the Omaha we have quite a class who are very progressive, and to encourage such and show that special confidence is placed in them I would recommend the following change in the rules governing the leasing of these lands:

That when it shall appear to the satisfaction of the agent that an allottee, by reason of industry and thrift, is well qualified to transact his own business, that in drawing leases on such allottees' surplus land the clause which now requires the payment to be made to the United States Indian agent be changed to read "payable to lessor;" that accompanying leases so changed shall be a statement of the amount of land cultivated by the lessor and a certificate of the agent that the party is thrifty, progressive, and qualified to transact his own business. Such a change in the rules would not only be very pleasing and encouraging to this class of Indians, but it would also tend to stimulate other allottees to qualify for this class.

The disposition of rentals derived from lands allotted to or inherited by minors is a question that has heretofore received much attention, but so far no adequate remedy has been found. Up to this time the rentals have been used by the parents or guardians, and in most cases it is not required either for their support or education, as every child of school age is or should be in a Government school, where everything required for support and education is provided. These rentals, if allowed to accumulate until these minors arrive at their majority, would furnish the necessary means for them to make a start in life. As it has been

impossible under the existing laws to accomplish this much-to-be desired object, I would suggest that a bill be introduced into the next session of Congress that would cover the case.

Crimes and liquor traffic. – Except the violation of marriage laws there have been but few crimes committed by the Indians during the past year, and for these few the liquor traffic is directly responsible. Many arrests have been made for violations of the liquor laws, and the parties arrested are now under bond to appear in United States court. On account of the prevalence of small pox on the reservation last spring the cases pending were not brought up in the United States court, but continued until the fall term, and the trial of these cases will doubtless result in a number of convictions.

It is evident that some of the towns adjoining the reservation foster and encourage the liquor traffic to attract the Indians to their town, when, with the aid of liquor, it is easy to get the last cent in their possession.

Education. – The schools on the reservation are as follows: The Omaha Boarding, a Government school, with accommodations for 60 pupils. The average attendance at this school during the past year has been less than formerly, attributed to two reasons – first, the large number of Omaha children attending nonreservation and district schools, so that the available children on the reservation of school age were barely sufficient to fill the school; second, smallpox

has been prevalent on the Omaha Reservation during a large part of the school year, and it was considered unwise during part of the time to take any new children into the school. The plant is old, constructed of wood, but with the repairs now being made is in fair condition. For a more detailed report of this school I would refer to the report of Superintendent Ratliff accompanying my report.

The Winnebago boarding school has not been in session since 1898, at which time the plant was destroyed by fire. A new plant, however, is now completed, with accommodations for 80 pupils, and the school will be opened by September 10.

Besides the Government boarding schools, we have the district schools located on all parts of the reservation. These district schools are established and operated under the State laws, primarily for the benefit of the white population living on the reservation. [271] I find that during the past year 137 Indian children have attended these schools. Most of the districts have a contract with the Government for the Indian children. When the Indian children attend these schools regularly this arrangement is very satisfactory, but too often the attendance is very irregular, and the enrollment in district schools is merely to avoid sending to the Government boarding schools.

Sanitary. – The report of the agency physician for Winnebago, as regards the health and sanitation of these people, can be embraced in a few words.

Taking the year past as a whole the record is a satisfactory one as regards the prevalence of disease, the small death rate, and the increasing demand for the attention of the physician when needed.

Each year shows a decided improvement upon the one preceding as regards the increased number of those abandoning their old-time superstitions in resorting to their "medicine men" when sick. It is safe to say that the large majority of these Indians call upon the agency physician when sick and follow his directions and advice.

While on every side of this reservation, during the entire year, smallpox has prevailed, through the strict enforcement of quarantine measures and careful and repeated vaccinations but a single case has developed here. This case was seen early and every precaution taken to prevent infection of others. No other cases have arisen, and with the great majority protected by vaccination there is little fear of a further spread.

No agency physician is regularly employed for the Omaha. Last December an epidemic of smallpox broke out among the Omaha, and on January 9 special authority was granted to employ Dr. E. A. Sears, the contract physician at the Omaha school, during the epidemic. From the report of Dr. Sears I find that he has treated 149 cases of smallpox, of which 7 died – 3 adults and 4 infants; 173 visits were made and 41 houses disinfected, and that no case has been traced to a house that had been disinfected, but

that the disease was spread by persons who would visit the sick while the disease was in its infectious stages. As strict a quarantine as possible was preserved. Cases were concealed for a time, which aided in the spread of the disease. The Omaha police were efficient in ferreting out cases and keeping up the quarantine.

Besides the smallpox there were 7 cases of diphtheria and 2 of scarlet fever, all of which recovered. Mumps have also been epidemic on the reservation for the six months past. Outside these epidemics the general health of the Omaha has been good and the death rate low.

Agriculture. – The season has been a peculiar one, up to July 1, favorable for all kinds of crops. The month of July was unprecedentedly warm, and without rainfall. This condition has materially affected the growing crops. Wheat and oats were well matured before the hot, dry weather, and are a good crop, and at this date, August 24, the thrashing is in progress. Corn has been much injured by the dry weather and lack of rain in July, but with as favorable weather in September as has been August, will make about half a crop. Potatoes are almost an entire failure. The hay harvest is now in progress and is a fair crop.

In making a general review of affairs at this agency, I find that the conditions are so dissimilar as to the Omaha and Winnebago tribes, that it will be necessary to treat of them separately.

The condition of the Omaha Indian is improving from year to year. They are better clothed and fed, and most of them are comfortably housed. A marked change for the better can be noted in the appearance of their homes and the pride displayed in the possession of a nice house. Good horses, well cared for, are the rule, and all have a good spring wagon or top carriage. The amount of land cultivated by the Omahas has increased, and the character of the farming improves each year. The Omahas fully appreciate the value of education, and little trouble is experienced in inducing them to place their children in school. The only difficulty we have experienced in this respect is that so many have been sent to nonreservation schools that there are not enough remaining on the reservation to fill the home school. Few farming communities in the country can make as good showing as the Omaha Indians in the per cent of children attending school. The Omahas, to a large extent, appreciate the advantages of citizenship, and are willing to assume the responsibilities and abide by the laws. This is illustrated by their willingness to conform to the laws in relation to marriage, which is a radical departure from their old tribal customs, yet they appreciate the necessity of the change.

A careful review of the condition of the Winnebago is not altogether encouraging. In some respects improvement can be noted, while in others the reverse is the case. That they are better clothed and fed than ever before in their history is true, and the [272] large majority are fairly well housed. The number of

Winnebago who are farming to any considerable extent has not increased, and the character of the farming is poor. There are among the Winnebago quite a number of young men who a few years ago made a good start and were doing well, who have now gone back, abandoned their farming, and are doing little or nothing.

In looking for the cause of this retrograde movement I find that the increased income derived from that portion of the allotments that are under lease has had an effect by increasing their income without exertion on their part; but this is not the only cause, or is it in my opinion entitled to first prominence.

Careful study and investigation of this question leads me to believe that the chief cause of these many failures is to be attributed to an unduly developed trait in Winnebago character – that of generosity, or rather, hospitality. This characteristic of the Winnebagoes has been fostered and developed by the long years of tribal life. If a Winnebago Indian exercises ordinary prudence and economy, so that all that he has is not at the disposal of his friends, he is simply ostracized. A Winnebago's home is always open to his friend and neighbor, and he is always ready to divide with him the last provisions in the house. In the abstract this is a commendable trait, but as practiced among the Winnebago it becomes a positive evil by removing all incentive to industry and thrift. The scripture, as applied to the Winnebago, should read, "For to every one that hath *not* shall be

given, and from him that *hath* shall be taken away," or consume the last of the provisions in the house.

I have in mind a number of young Winnebago who some years ago moved on to their allotments in the western portion of the reservation. In most instances a house was erected for them by the Government, and they were also provided with teams, wagons, and farming tools. The majority of these young men were, for a time, industrious and successful, but year by year the number of those who persevered has become less until now only two or three remain, and the cause of this failure is simply this: they have been "eaten out of house and home" by their visiting friends, who would use their homes for hotels on their numerous trips to the railway towns in the western part of the reservation. The hospitality is carried to that extent that the last setting hen and brood sow is slaughtered to provide for the univited guests.

It has been suggested that no able-bodied man be allowed to lease any portion of his allotment until he should farm a reasonable amount. If this rule was enforced, it would, I fear, result simply in the punishment of the old and infirm men and the women and children. There is no question but that the latter class should be allowed to derive an income from their allotments, and if the able-bodied men were not allowed to lease any portion of their allotment it would simply result in their living off of the other class. By allotment or heirship, by far the larger portion of the reserve is held by those who are not

able to farm themselves. This is the condition as I understand it. I am at a loss to see what adequate remedy can be applied without working a great injustice to the many.

The Winnebago have been quite ready to accept the privileges of citizenship, and ready to assume a part of the responsibilities, but desire to elect how far they shall go. They appreciate the advantages of individual ownership of land, and are keen to exercise the elective franchise, and the laws as to the rights of property are generally observed.

On the other hand, however, the laws pertaining to marriage and divorce are openly ignored. Marital relations are assumed and dissolved at will. This question is one that has been given much attention, and has been the subject of much correspondence to your office. Painstaking effort has been made to explain the situation to the Indians of the necessity of complying with the law, and the effect of its violation. That they might be fully informed, the following quotation from your letter of June 12, 1901, has been published and generally circulated among them:

"The Winnebago should understand that in continuing their loose and promiscuous tribal customs of marriage and divorce they not only render themselves liable to heavy penalties for infractions of the law, but are placing upon their children the ban of illegitimacy and endangering their rights of inheritance to property through the many complications that will hereafter ensue in tracing the lines of

descent. They should think of their children and those who are bound to them by the ties of blood and marriage. They should realize that as they now hold their property in severalty the tribe must give way to the family, and that anything they may do that will have a tendency to disturb the even balance of the family relation will surely prove destructive and disastrous."

It is especially noteworthy and discouraging that violations of law in this respect are not confined to the uneducated. Young men and young women graduates from the nonreservation schools assume these unlawful relations immediately upon their [273] return to the reservation, not that they think it is right or best, but simply because they are not strong enough to stem the tide of public opinion. The most influential members of the tribe and those who are in most respects law-abiding citizens openly and actively oppose and discourage those who desire to comply with the marriage laws. Especially active is the opposition of the older women. I have been slow to resort to extreme measures, but it is useless to defer action longer. There are none now among these people but know what the law is and the penalty for its violation. Arrangements have been made, and active prosecutions will be instituted at an early day.

In conclusion I desire to express my appreciation of the efficient service rendered by all the agency employees, and to thank the Department for the hearty support and many courtesies I have received.

Very respectfully,

CHAS. P. MATHEWSON,
United States Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SUPERINTENDENT OF OMAHA SCHOOL.

OMAHA AND WINNEBAGO AGENCY, NEBR.,
August 23, 1901.

SIR: I have the honor to submit in third annual report of the Omaha Boarding School for the fiscal year ended June 30, 1901.

The school year closed on June 19, ending a period of forty weeks and three days. There were 6 cases of smallpox in the school, but all were mild. Forty-one pupils and one employee had the mumps. For about two months the class room work was almost broken up on this account, and the work was doubly heavy on the industrial employees.

The most characteristic feature of the year has been the improved relation with the children. We have now been here long enough to get better acquainted with the pupils, and also with their parents. The pupils have felt more free and natural and the school has been more homelike. This has brought the better side of their dispositions to the surface in a way that is highly gratifying.

In my judgment the best change in plan of school work the past year has been the sending of the younger half of the children to school all day. During the past three years there has been a growing inclination on the part of the older pupils to go away to the nonreservation schools. This has left our school filled almost entirely with either small or smaller pupils. Scarcely half of these are large enough to do more work than a few chores. Keeping them in school all day brings them on faster, makes them better contented, and prevents many runaways among the little boys.

This tendency toward small pupils has worked hardship to the employees. With more little ones to care for and less help from larger pupils, the burden of the daily work has been oppressive. It seems impossible to keep up properly all the necessary departments of work in a small school with few large pupils, at the same per capita salary cost as can be done in a larger school where there are plenty of well-grown boys and girls to help with the work.

Some of the Omahas are asserting their dignity as citizens by keeping their children at home in ignorance. The school is unable to do anything for these without the help of a Federal compulsory education law, framed to cover such cases.

Within the past year the laundry has been moved, repaired, and enlarged. This makes a much and long-needed improvement, as the old laundry was too small, and also was so near the main building

that if the laundry had burned it would almost surely have burned the main building as well.

This summer, since June 30, quite a number of minor repairs and improvements are being made which will be very much to our advantage. The more important of them are: New floors, wainscoting, storm entrances, flag pole, fence near main building, coal bins, board walks, kalsomining, papering, painting.

Plans and specifications have been submitted which seem likely to lead to a water system which will furnish an ample supply without hauling water in barrels, and which will furnish fire protection as well. A steam heating plant is very much needed to take the place of a large number of stoves; a gasoline lighting system to take the place of kerosene lamps; more barn and shed room for the shelter of farm implements and school stock; and a flour bin for the better protection of flour. Within the past two years the school has lost nearly 2,000 pounds of flour by depredation from rats.

This present summer the school crops have been very much shortened by dry weather. The oats crop was fair. The millet is fairly good. In all there will be enough rough food, so we shall need to buy only about one-half the hay estimated for. The corn will apparently be almost a failure. Potatoes are not dug yet, but will likely not yield above fair. The early garden vegetables did well, but the later ones are almost dried up, except that there is a sufficient supply of

onions. However, most of the garden crops come in season when the pupils are away, and so are of little use to them any year.

The school heartily appreciates the courtesy and the considerate attention given by the Indian office to requests made in course of the year, also the liberality which has enabled us to add so much to the school in the way of minor improvements, comforts, and conveniences. The United States Indian agent, Chas. P. Mathewson, and his subordinate employees, have given their hearty support to the school, and have been uniformly courteous and obliging.

Very respectfully,

RUSSELL RATLIFF, *Superintendent.*

The COMMISSIONER OF INDIAN AFFAIRS.
(Through Chas. P. Mathewson, United States Indian agent.)

* * *

[201] REPORTS CONCERNING INDIANS IN NEBRASKA.

REPORT OF SCHOOL SUPERINTENDENT IN CHARGE OF OMAHA AND WINNEBAGO AGENCY.

OMAHA AND WINNEBAGO AGENCY,
Winnebago, Nebr., August 24, 1903.

SIR: I have the honor to submit herewith my fifth annual report of affairs at this agency.

Reservation. – The Omaha and Winnebago reservations are located in northeastern Nebraska, and comprise the larger portion of Thurston County, excepting about 20,000 acres, and several sections in each of the counties of Burt, Cuming, and Dixon, making a total area of 250,000 acres. The eastern portion, bordering on the Missouri River, is very broken. It was originally well timbered, but the timber now remaining has little value except for fuel. A vast amount of new growth promises well if left for a sufficient number of years.

The central and western portions of the reservation consist of rolling prairie; the hills furnish abundant pasture for thousands of cattle, while the numerous valleys of the Logan, Omaha, and Blackbird creeks and their branches are the most fertile and productive agricultural lands.

Originally this tract in its entirety was held by the Omaha Indians and was a part of their reserve, the Omaha having made their home in this immediate vicinity from the earliest history of the Missouri Valley. By the treaty of March 6, 1865, the Omaha ceded to the United States the northern portion of their reservation. Then, after a treaty with the Winnebagos, the Government located them on this land, where they now hold allotments.

Census. –

Omaha:
All ages – males, 601; females, 615..... 1,216
Children of school age..... 362
Winnebago:
All ages – males, 589; females, 513..... 1,102
Children of school age..... 296

Leasing. – Of the 250,000 acres embraced in the reservation about 200,000 must be considered surplus, leaving 50,000 acres above which these people can not in reason be expected to cultivate themselves. As the land is largely agricultural and under cultivation, the number of leases must necessarily be very large. By far the most important features connected with the business affairs of this agency are the renting of this large amount of surplus allotted land, collecting the rentals therefrom, and disbursing them. The prices paid as rentals are good when all things are taken into consideration, such as the short time for which leases can be made, the great uncertainty of obtaining a renewal, the poor character of improvements, and the lack of school and church privileges, etc.

I have heretofore recommended that the rules which require the agent to collect and disburse funds derived from the leasing of allotted lands should be modified so as to allow the more progressive allottees to transact this part of the business themselves. I am more than ever convinced of the wisdom of such a course. The time is very near when the largest

portion of these allotments must be conveyed to these people without any restrictions upon alienation and the entire responsibility assumed by the allottee without any restriction being exercised by the Department either as to lease or sale. In the act of Congress under which the Omaha are allotted no provision is made for extending the trust period. It is doubtless necessary that all leases be subject to the approval of the Secretary, yet it would appear wise to throw all the responsibility possible upon the allottee, so that he may acquire some business experience before assuming full control. Everything possible has been done to comply with existing rules of the Department as to the leasing of the Indians' lands, yet where we see an allottee capable we place upon him the responsibility of getting the highest rentals which he is able to secure, and seeing that the lessee fully complies with all the requirements of the lease.

Allotments. – Practically all of the Winnebago Reservation has been allotted, the little remaining being timber, which should be held in common, so that all may be provided with fuel. The same facts exist as to the Omaha, except as to about 5,000 acres, which has been claimed by certain mixed-blood Omaha. The litigation over the rights of these parties to allotments has been in the United States courts for the past twelve years, and has not yet reached a final determination. If the claims of [202] these parties are disallowed by the courts, it will be necessary to have an act of Congress to provide for the allotment or sale of this very valuable tract of land.

Sale of inherited Indian lands. – Under the act of Congress of May 27, 1902, providing for the sale of inherited Indian lands, there had been sold up to July 20, under amended rules of October 2, 1902, 9,400 acres, the average price obtained being $22.70. The amount of inherited land on the Winnebago Reservation is large, owing to the fact that 487 allotments were made over thirty years ago, and as these allotments were all made to heads of families, very few of these original allottees are now alive. The total amount of land on both the Omaha and Winnebago reservations, which is subject to sale under this act, will be about 10 per cent of the reservations, excluding the numerous tracts of inherited land in which minors are interested.

It has already developed in the sales that have been made that it is very difficult, and in some cases impossible, to obtain satisfactory proof of heirship. The family history is often obscure, and we have no records of value, as to family history, except of recent years. I would recommend that either by law or Department regulation it should be required that every estate of an allottee be administered in the proper court within a reasonable time after the death of the allottee, avoiding great expense and endless litigation.

Education. – The Omaha and Winnebago are each provided with a Government boarding school. The Winnebago have a new school plant with most of the modern conveniences, accommodating 100 pupils. The Omaha school plant is old and of frame

construction, and is not equipped with heating or lighting systems. It is, however, in a good state of repair. Both of the schools have had a very successful year, the attendance being about up to the capacity. The reports of both the superintendents of the Omaha and the Winnebago schools are forwarded herewith.

Besides the Government schools there are numerous district schools, organized and operated under the State laws. While the prime object in the organization of these districts was to provide school privileges for the white renters on the reservation, yet it has developed that many of the Indians have availed themselves of the privileges thus afforded. A number of these districts have contracts with the Government for the education of the Indian children who attend. Of the Omaha, 77 attended the district schools during the past year and 32 of the Winnebago. This attendance was divided among twelve districts. The Omaha are strongly in favor of the district system, and it is the desire of the tribe, after more districts are organized and all are in easy reach of one of these schools, to discontinue the Government boarding school. I am of the opinion that this can be done within a few years.

Sanitary. – As no physician is employed for the Omaha, a detailed report of the sanitary condition can not be given. The following, by Dr. Hart, agency physician for the Winnebago, will, however, generally apply to the Omaha:

As each year calls for a report as to the sanitary condition of the Indians under his care, the physician realizes how difficult it is under existing circumstances to give accurate and comparable statistics as regards the mortality from various diseases, the advances, if any, made in sanitation, correct methods of living, etc. Experience shows how impossible it is to obtain the causes of death among Indians, and without causes for the mortality statistics are unreliable and comparisons therefrom are difficult. For the present the physician must content himself with deductions drawn from imperfect data, but hoping in the course of years to be able to avail himself of improved methods.

The past year has shown an unusual amount of sickness among these Indians. During the winter measles prevailed as an epidemic and influenza raged in rather a severe form. Respiratory affections, pneumonia, and bronchitis particularly were the cause of many deaths. It was a gratifying fact, and so noticeable that the effect must have been a good object lesson to the Indians, that no deaths from measles occurred where the patient was cared for by the physican and no death from any cause at the boarding school where the children had the best of care and attention.

It is gratifying also to report that while much serious sickness has prevailed, and considerable mortality, that the death rate has, for the first time in some years, been

less than the birth rate. For the preceding year the number of deaths was 80 and births 38, while for the past year the deaths were 33 and the births 46. The epidemic of smallpox which occurred during the preceding year was, of course, responsible for the large number of deaths.

The sanitary arrangements of the boarding school are good, and leave nothing to be desired but a hospital addition where the sick can be better cared for and cases of communicable disease isolated. The school employees have been exceedingly kind and attentive to the sick children.

In conclusion, it can be said that the Winnebago show an increased desire to avail themselves of civilized methods of medical treatment, and much advancement has been shown in the past few years.

Agriculture. – The accompanying statistics in regard to agricultural products, etc., have been as carefully prepared as circumstances would permit. We have no farmer connected with the Omaha Reservation, so have been obliged to collect the information through the police. At this date, August 15, very little thrashing of oats and wheat has been done owing to the excessive wet weather since the cutting of the grain. But enough is known to make it certain that the yield will be very much below the normal, due to a late, wet, and cold spring, conditions which interfered materially with the seeding. For the same reasons the weather has been unfavorable for corn.

Early planting was prevented and continued wet weather retarded its growth, yet at [203] this time corn looks very promising, and if frost does not come too early there will be a fair yield. The prospects for a good hay crop are the best. Potatoes and all kinds of vegetables are an excellent crop.

Annuities and trust funds. – During the past year the Omaha have been paid $100,000 out of the principal of the trust fund held by the Government. This payment was authorized by act of Congress and paid by direction of the Secretary of the Interior. The larger portion of this money has been used by the Omaha in permanent betterments, such as the building of houses, barns, and granaries, the purchase of farming implements, wagons and horses, and the payment of debts. In addition to this $100,000 a small interest payment of $10 per capita was made. The Winnebago have also been paid from their interest fund $8.73 each.

I am more than ever convinced that small annuity payments should be discontinued. The day has passed when they serve any useful purpose. Neither the Omaha nor the Winnebago require this money for their support, but so long as they continue to receive it they will contract debts on the strength of it far beyond their ability to pay.

I most earnestly recommend that legislation be enacted so that all funds held by the Government will be placed to the credit of each individual allottee – in the case of adults to be paid out only upon the

direction of the Secretary of the Interior when it is shown to his satisfaction that it is required for their support, or for some permanent betterment, such as buildings, purchase of stock, etc.; in the case of minors these funds to be held until they reach their majority, and then subject to the same rules as in the case of other adults.

Liquor traffic. – The most discouraging thing connected with the management of affairs at this agency is the ever-present liquor traffic. Energetic and persistent efforts have been made by myself and every employee to put a stop to the sale and consumption of liquor. We have had the hearty cooperation of the United States court officials and the local justice of the peace. In the United States courts 64 complaints have been made and 50 convictions secured. The local justice has tried and convicted 155 for drunkenness and disorderly conduct, yet with all this I am unable to see that conditions are bettered. Simply fines and jail sentences will never discourage the use of liquor among Indians. If every conviction for violation of United States law were followed by a penitentiary sentence we could hope for relief.

During the past year 90 per cent of the liquor obtained by the Indians of the reservation has been in the town of Homer, which should be renamed either Sodom or Gomorrah. This town is located only a few miles from the north border of the reservation, and its two saloons, and the army of "boot-leggers," through whom they operate, make it possible for any Indian to obtain at any time all the liquor he may

wish or that he has the cash to purchase. Of the white men convicted during the past year, 22 were for offenses committed in this town. I do not think it will be possible to put a stop to this wholesale business until the real offenders, the saloon keepers, are convicted and given a sentence to the full extent of the law. Efforts to this end are now being made, and I hope soon to be able to report that our efforts have been successful. The people of the town could suppress this business if they would. Instead, they encourage it in every way. They know the Indian to be lavish with his money at any time, but he is worse than lavish when intoxicated and is reckless when under the influence of liquor. Advantage is taken of his weakness, and as a result the residents of the town are lining their pockets with silver at the Indian's expense.

Crimes and offenses. – There have been very few crimes committed on the reservation the past year, except as to violation of the liquor laws, and these few are directly traceable to that cause. One murder resulted from a drunken brawl among the Winnebagoes, in Dakota County, just north of the reservation line, directly chargeable to Homer whisky. The unfortunate Indian is now serving a four years' sentence in the State penitentiary.

Employees. – The clerical force connected with this office has been overworked. The number of employees remains the same as for a number of years, while the work connected with leasing and the sale of inherited lands vastly increased. Recently we

have also been unfortunate in losing two valuable clerks, one by transfer and promotion, the other by resignation. The assistant clerk, acting in the capacity of leasing clerk, after something over a year's service here, having become thoroughly familiar with the work, was promoted and transferred. Our stenographer and typewriter was forced to resign on account of failing health. Especially is it unfortunate to have a change in leasing clerk, for efficient and faithful as an employee may be, it is only after becoming thoroughly informed as to the local conditions, acquainted with the Indians and their family relationships, that he is properly equipped for taking charge of this work.

[204] **Conclusion**. – Following the general plan of the Department to do away with Indian agents and place the agencies in charge of bonded superintendents, on June 30 the position of agent for the Omaha and Winnebago Agency ceased to exist and terminated my four-and-one-half years' service in that capacity. Supervisor A. O. Wright took charge of the agency until July 16, when I resumed charge as superintendent and special disbursing agent.

A general review of the situation at this agency does not lead me to an entirely optimistic view. The large income received by these people without effort on their part is doubtless the greatest drawback to their progress. There is no incentive to work.

I will simply say I have endeavored faithfully to perform the manifold and difficult duties connected

with the management of affairs here. It is only just to say that in this work I have been assisted by employees, both in the office and schools, who have been faithful, loyal, and competent. I desire to acknowledge the generous treatment and many favors extended by your office, and while I continue in charge of affairs here my most earnest efforts will be given for the advancement of these people in all things that tend to right living and good citizenship.

CHAS. P. MATHEWSON,
Superintendent and Special Disbursing Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SUPERINTENDENT OF OMAHA SCHOOL.

OMAHA AND WINNEBAGO AGENCY, NEBR., *August 8, 1903.*

SIR: I have the honor to submit my fifth annual report of the Omaha boarding school for the fiscal year recently ended.

The school closed and all the pupils left on the 17th of June. This ended a school period of forty weeks and three days. We have no vacation at holiday time nor in the spring, so the term ends before the close of the fiscal year. The average attendance for the year is nearly 74½.

As the mail routes are at present established, the quickest way to communicate with the school is by telegraph to Sioux City, Iowa, thence by telephone to

Winnebago, Nebr. (where the Indian agent's office is located), thence by mail to Omaha Agency, or by telegraph to Sloan, Iowa, by mail to Omaha Agency. Our post-office is "Omaha Agency," in the trader's store on the school farm.

Last fall the school filled up more easily, quickly, and pleasantly than in any other one of my five years here. Also the past year had the least of friction with the parents of any one year. This was partly due to the fact that many of their petty wishes were yielded to, even when it would have been better for the school otherwise, but that the Indians were in better temper when their requests were granted.

A good many of the Indians here are in a peculiar, a critical, and a trying stage of development. They are citizens, and feel the dignity of their citizenship to the extent that they are very unwilling to be controlled, but have not developed far enough to be able to control themselves rationally by any means. But this is not the case with all of them. Some realize that they need the Federal protection, and appreciate the efforts being made for their advancement. The parents were considerably inclined to keep the children overtime when they went home for Sunday visits. The majority have not yet advanced to the stage where a promise means much. There is little distinction between the value of truth and untruth. The increase in the number of good houses on the reservation and of other material improvements does not seem to have an equal counterpart in the growth of the cardinal virtues. Along with these trying features,

however, has been, on the part of various parents, a noticeable increase in appreciation of the interest taken in the children and of the many things done at the school for their comfort, enjoyment, and advancement.

The past year we succeeded farther than in any previous year in noticing or in anticipating little things needed for the comfort or contentment of the children and in that way preventing complaint. For instance, Many little ailments of the children were, by close observation, discovered before they told them (they often are slow to tell) and treated early. Also the tables were better waited upon – the little folks helped before they asked in many cases. Often the small ones are backward and will not ask for all they want, but will go out and complain to their parents that they do not get enough to eat.

The new water system which was put in in June is the special improvement of the year. It was not in operation till after the pupils left, and so has not been thoroughly tested. Still, there is little doubt but what the supply will be abundant. This will dispense with hauling water, which took up much time and gave the boys little training.

One year ago this summer the millet and oats (for hay) were good, the corn was about an average for the season, the potatoes were poor. This season there are about 26 acres of corn, 9 acres of millet, 5 acres of oats, 3½ acres of potatoes. A moderate crop of millet is being harvested now; the oats had the rust

badly; the corn, potatoes, and garden are fair. The season has been too wet here for first-class crops this year.

In the reading circle the employees familiarized themselves still further with the course of study. They took up and discussed various points of Indian education taken from Indian school papers and from other sources. Matters of interest in education throughout the country in general were brought in. Attention was also given to current events.

In the evening hour instruction in note reading in music was given. Calisthenics and the flag salute were usual features. Talks to the pupils by various employees were given, but it was not found practicable to continue these talks to the end of the year. The children look forward with pleasure to the "play hour" on Friday evenings.

The children made progress in their studies through the year; but this work was interrupted by a change of teachers in each room. In one case the change was caused by the sickness of the teacher herself, in the other case by sickness in the teacher's home. The course of study was followed as far as practicable.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

"THE BEST FARMING LAND IN THAT REGION"*: LAND, BOUNDARIES, AND RESIDENCY ON THE OMAHA INDIAN RESERVATION IN NEBRASKA

A Report

Submitted by

R. David Edmunds, Ph. D.

Richardson, Texas

May 23, 2012

TABLE OF CONTENTS:

The Early Period.....3

First Treaties With the United States.....5

The Treaty of 1854.....10

The Winnebago Treaty of 1865 16

First Attempts at Allotment.....18

---

* Quote in the title is taken from a description of the western section of the Omaha Indian Reservation contained in a speech by Senator Omar D. Conger (R) of Michigan, on the floor of the U.S .Senate, April 19, 1882. (CONGRESSIONAL RECORD, 47th Congress, 1st Session, page 3032).

The Unsuccessful Land Sale of 1873 21

The Winnebago Treaty of 1874 and Unsuccessful Sale of Lands to the Poncas 23

The Progressive Omahas' Request for a New Allotment.....25

The Sale of the Railroad Right of Way 28

A Legislative History of the Land Act of 1882.....29

The Land Act of 1882: An Evaluation.....48

Subsequent Legislation and Commentary Regarding the Land Act of 1882.....52

Confusion Over Federal Statistics.....56

The Allotment Process.....57

Omaha Residency and Utilization of Lands West of the Railroad Right of Way 60

Chaos in Thurston County.....66

Maps.....74

Recent Opinions of the Office of the Solicitor, U. S. Department of the Interior.....80

Summary and Conclusions 82

Endnotes 94

THE EARLY PERIOD

The Omaha people have long been associated with the rolling prairies and forested bluffs of the central Missouri River valley. Although tribespeople and archaeologists both trace the origins of the Omahas to a distant past in the Ohio River Valley, perhaps in southern Ohio, Indiana, or northern

Kentucky, sometime prior to 1500 they and other Dhegihan Siouan speaking people crossed the Mississippi and spread westward toward the eastern plains. Omaha traditions indicate that when they arrived at the Mississippi, the Quapaws (the "Downstream People") moved south, then ascended the Arkansas River, while the Omahas (the "Upstream People" or "those going against the wind or current"), the Poncas, and the Iowas migrated up the Missouri or Des Moines river valleys, eventually settling at a large village on the Big Sioux River in northwestern Iowa. Between 1683 and 1700 the Omahas divided from the Poncas and Iowas and established villages across the Missouri in eastern Nebraska. Here the Omahas built large earthen lodges along several tributaries (Bow Creek, Omaha Creek, Blackbird Creek, Iowa Creek, the Elkhorn River, etc.) flowing into the Missouri, and hunted westward out onto the plains.[1]

Unfortunately for the Omahas, their occupation of the central Missouri Valley was followed by a migration of large numbers of Dakota or Sioux people, driven west from the upper Mississippi Valley by the Ojibwas. As the more numerous Sioux descended on the region, they forced the Omahas from their villages in northern Nebraska and the tribe consolidated its villages near Omaha and Blackbird creeks, and along the Elkhorn River. Crops of corn and pumpkins were produced at these semi-permanent locations, while hunters ranged on both sides of the Missouri, hunting deer in Iowa or bison as far west as

the Sand Hills and central Platte Valley in western Nebraska. During the early eighteenth century, the tribe began to trade with Creole French and Spanish merchants who ascended the Missouri from St. Louis, and by the 1760's, they had acquired horses and combined many of their villages into a larger settlement, "Big Village," located on Omaha Creek near its juncture with the Missouri. Big Village soon became a center of commerce on the central Missouri as Omaha middlemen traded agricultural products and European trade goods for horses and hides from tribes living to the north and west.[2]

Omaha political and economic influence along the central Missouri peaked during the 1790's when the tribe was led by the shrewd but enigmatic Blackbird. Under Blackbird's leadership the Omaha villages became the focal point for the interchange of goods between all the Missouri River tribes and the St. Louis merchants, and Omaha control of the river was so complete that they forced traders to pay a tribute to the tribe, forbidding the merchants to ascend the river past the Omaha villages. Aware that he held the balance of power in the region, Blackbird refused to be intimidated by the Spaniards at St. Louis and threatened to turn to the British as a major trading partner if the Spaniards were uncooperative. Tragically for Blackbird (and the Omahas) however, in 1800 the Omaha chief contracted smallpox after visiting the Pawnees and carried the pestilence back to his tribe. Blackbird died, and during the winter of 1800-1801 the disease ravaged the Omaha villages.

At least 400 villagers succumbed to the malady, and in its aftermath the Omahas' control of trade and politics on the central Missouri was broken.[3]

The Omahas clung to their lands in eastern Nebraska, but during the early decades of the nineteenth century they were hard-pressed to defend them. Although their population had approached 3000 in 1790, disease and warfare took heavy tolls; by the first decade of the nineteenth century it fell to half that number.[4] In addition, they were plagued by the Sioux. Although the Sioux probably had no intention of settling permanently on the Omaha lands in eastern Nebraska, they repeatedly harassed Omaha hunters pursuing bison on the plains. In addition, Sioux war parties struck at Omaha villages, destroying forty Omaha lodges in 1804. The Omahas also fell victim to Sauk and Fox raiders from Iowa. During the 1820's, many of the Omahas abandoned their lodges at Big Village and fled to a new settlement on the Elkhorn River, but the attacks continued and the Omahas remained on the Elkhorn through 1833, until after the Sauks and Foxes were defeated in Black Hawk's War.[5]

FIRST TREATIES WITH THE UNITED STATES

In response to their declining position, the Omahas sought closer ties with the United States. The United States acquired at least a nominal title to the Missouri Valley in the Louisiana Purchase of 1803, and when Lewis and Clark ascended the

Missouri River one year later they had stopped at Big Village, but found the Omahas absent on their summer hunt.[6] In July of 1815, a delegation of Omaha chiefs journeyed to Portage des Sioux, near St Louis, and signed the tribe's first official treaty with the federal government. The Omaha treaty was one of thirteen separate treaties signed by federal officials with different tribes at this location during the summer of 1815. These documents were designed to end any hostilities manifested in the War of 1812, and to assure goodwill between the government and the tribes. The Omahas agreed that "perpetual peace and friendship" should reign between "the citizens of the United States" and "the tribe or nation of the Mahas" and they also acknowledged "themselves and their tribe or nation to be under the protection of the United States and no other nation, power, or sovereign, whatsoever."[7] The Portage des Sioux Treaty is important since it initiated the Omahas' subsequent and continuous reliance upon the federal government as the sole protector and arbiter of the tribe's relationship with other political entities and non-Indians.

Federal protection proved elusive. Prior to 1832, the federal government was incapable or unwilling to protect the Omahas from the Sioux or Sauks and Foxes, and although the Sauk and Fox threat diminished after the Black Hawk War, the Sioux menace continued. In 1833, the Omahas moved back to the Big Village site on Omaha Creek where they remained for eight years until they again were forced to flee Sioux incursions. They reoccupied the Big Village

site, between 1843 and 1845, but in the latter year the Sioux again attacked and the Omahas fled down the Missouri, taking refuge near the Indian agency at Bellevue.[8] Meanwhile, their western hunts along the Platte River were threatened by the Pawnees. These were difficult decades for the Omahas. Within a span of forty years they had descended from their status as "masters of the river . once one of the numerous and powerful tribes of the prairies, vying in warlike might and prowess with the Sioux, the Pawnees, the Sauks, the Konzas, and the latans," to a people hard pressed to defend their homeland, reduced to hunting small game near the Indian agency at Bellevue.[9]

In contrast to the federal government's failure to provide the protection it had promised at the Treaty of Portage des Sioux, the Omahas attempted to fully cooperate with the government. In 1819, Omaha leaders met with federal officials at Council Bluffs, Iowa and ceded a fifteen square mile tract of land on which the government subsequently erected Fort Atkinson. The treaty was never ratified, but the fort was built and the Omahas evidently were paid some supplies, weapons, and ammunition for the cession, although the extent of this payment remains uncertain. The fort was occupied until 1829, then abandoned.[10]

In October, 1825 Omaha chiefs signed a second treaty at Fort Atkinson in which they renewed their friendship with the United States, and the federal government reiterated its promises of protection. No land was ceded by the tribe, but the Omahas agreed

to protect American merchants plying their wares within the Omaha villages and to allow "legally authorized" American citizens to cross their homelands. The treaty also provided that the tribe would report to "the superintendent or agent of Indian affairs, or other persons appointed by the President," if a crime was committed by a non-Indian on Omaha land, and that the Omaha chiefs would "deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States." Obviously, the Omaha tribe was willing for the federal government to intercede in its relationship with local non-Indians.[11]

The first major Omaha land cession occurred five years later. In July 1830 the Omahas and other tribes met with federal officials at Prairie du Chien, in modern Wisconsin. After first signing an informal (and meaningless) peace treaty with the Sioux, Sauks and Foxes, and several other tribes, on July 10, 1830 the Omahas ceded their claim to all lands lying east of the Missouri River. In return, the Omahas received $2500.00 "annually for ten successive years," payable in "cash, merchandise or domestic animals." They also received the services of a government appointed blacksmith for ten years, some additional agricultural implements, a $3000 annuity for ten years to provide for the education of Omaha children, and they shared in over $5000 worth of treaty goods that the government distributed to all Native American representatives attending the multi-tribal gathering in

Wisconsin. In addition, the Omahas agreed to the establishment of a tract of land (The "Half-Breed Tract") between the Grand and Little Nemaha rivers in southeastern Nebraska. The tract was to be used for the settlement of those individuals of mixed lineage among the Omahas, Iowas, Otoes, and Yankton and Santee Dakotas who might wish to relocate to the region. Since the area was claimed by the Otoes, the Omahas and other mentioned tribes agreed to pay the Otoes $300 per year for ten years to reimburse them for these lands.[12]

Significantly, Article 12 of this treaty also explicitly stated that, "It is agreed that nothing contained in the foregoing Articles shall be construed as to affect any claim, or right in common, which has heretofore been held by any Tribes, parties to this Treaty, to any lands not embraced in the cession herein made; but the same shall be occupied and held by them as heretofore."[13] This provision seemed to assure the Omaha retention of their lands in eastern Nebraska. In contrast, both the tribe and their Indian agent were confused about Article One of the Prairie du Chien treaty. This article stated that the tribe had ceded all its right and title to the lands in Iowa, but did not specifically forbid the Omahas from hunting in the region, and the tribe assumed they would be able to hunt deer there for the foreseeable future. But in 1837 federal officials moved large numbers of Potawatomis into western Iowa, effectively cutting off the Omahas from their eastern hunting lands. Indian Agent James Dougherty argued that the original

treaty, (the document signed by the Omahas at Prairie du Chien) had stated that the Omahas would have joint use of the hunting lands in western Iowa, but had been rewritten in Washington to award exclusive use of the region to any tribe (the Potawatomis) the president might settle in the region. Dougherty also asserted that the Omahas would never have relinquished their right to hunt in the region for a total payment of only $25,000, and pointed out that without access to the Iowa hunting grounds, the Omahas would starve. Commissioner of Indian Affairs Carey H. Harris agreed that considerable confusion had emerged over the text of the final treaty, and in 1838 sent Dougherty another treaty which would have provided the Omahas with an additional cash payment $15,000 to relinquish their hunting rights to the lands in question. The Omahas accepted the offer, and signed the treaty, but the U.S. Senate then refused to ratify the agreement. The Omahas now found themselves bereft of their eastern hunting lands and vulnerable to attacks by the Sioux and other enemies if they ventured out to hunt on the plains.[14]

By the early 1840's the once powerful Omahas were in dire straits. Their annuity payments from the Prairie du Chien treaty ended in 1841 and their former hunting lands were inaccessible. During the winter of 1843-1844 they were so short of food that several Omaha warriors crossed the Missouri River and pilfered corn and livestock from the more prosperous Potawatomis. In 1845, the Sioux burned their

village near the Blackbird Hills, and the Omahas fled to the Indian Agency at Bellevue where they eked out an existence on roots, berries, and "now and then a stray raccoon or muskrat." Federal officials issued emergency rations of corn, but the Omahas still suffered. By 1846 they had shrunk to "a pitiable handful of scarcely more than a hundred families," and in 1849 a Jesuit missionary warned that the tribe was in "a state of nearly absolute destitution." Other non-Indian observers reported that the Omahas were almost always both "naked and hungry." Meanwhile, the Omahas themselves compounded their problems. Although the fur trade in the region had declined precipitously, many Omahas traded their limited supply of pelts to local merchants for whiskey. Council Bluffs emerged as a focal point for the sale of alcohol in the region, and the Omahas, like other tribespeople, gained ready access to it.[15]

THE TREATY OF 1854

Their economic base disintegrating, the Omahas reluctantly turned to their only remaining asset: their homeland. During the early 1850's, officials in Washington decided to acquire much of the remaining tribal lands on the eastern fringe of the central plains. They hoped to remove as many tribes as possible to the Indian Territory or to regions north of the Missouri. Anticipating that a transcontinental railroad would be constructed across Iowa and Nebraska, Indian agents were particularly eager to clear Indian title to lands in its path.[16] Initially, the

majority of Omahas opposed such a cession and refused to send a delegation to Washington unless all the men of the tribe would be included. Obviously, such a negotiating party would have been impossible, so in January 1854, Indian Agent Thomas Gatewood negotiated an unauthorized treaty at the Council Bluffs Agency on his own. In the "treaty" the Omahas agreed to relinquish most of their remaining lands in Nebraska, and to accept a reservation within the ceded region. In return, Gatewood committed the government to pay the Omahas $40,000.00 (in cash) per year for thirty years, plus additional arms and ammunition. In addition, over $7000.00 was to be paid to Peter Sarpy, Louis Sansouci, and Logan Fontenelle, three traders to whom the Omahas were in debt. The Omahas agreed that six delegates (Logan Fontenelle, Joseph La Flesche, Village Maker, Little Chief, Yellow Smoke, and Standing Hawk) would accompany Gatewood and the treaty to Washington, where they were authorized to **"slightly modify"** the treaty if needed, prior to its acceptance and ratification by the federal government.[17]

Commissioner George Manypenny rejected the Gatewood agreement. Angered that Gatewood had negotiated the agreement without proper authorization, Manypenny also argued that Gatewood's agreement to pay the Omahas $40,000 per year for thirty years was too generous, and that the $7000 payment of Omaha debts to the traders smacked of fraud. Although Gatewood informed Manypenny that the six delegates were authorized by the Omaha tribal

council only to "slightly modify, alter or amend" the existing agreement, Manypenny demanded major changes which essentially created a new treaty. Isolated from their kinsmen and still faced with providing some sort of remedy for the Omaha economic dilemma, the delegates succumbed to federal pressure. On March 16, 1854 the Omaha delegation signed a new treaty relinquishing almost all their remaining lands in Nebraska.[18]

The new treaty was less generous to the Omahas. Instead of total annuities of $1,200,000.00 (in cash), which had been delineated in the Gatewood treaty, the treaty of March 16, 1854 provided annuities and other payments amounting to $881,000.00, which were to be remitted in either cash, goods, services, "and other beneficial objects" which in the president's judgment would "be calculated to advance them in civilization, . . . moral improvement and education. . . ." Article One of the new treaty supposedly set aside a reservation for the Omahas within the far northern regions of their ceded lands, just south of the Missouri River and north of a line drawn due west from the mouth of Iowa Creek (near modern Ponca, Nebraska), but since this region abutted territories controlled by the Sioux, it is doubtful if the Omahas ever seriously considered relocating their villages into the region. However, Article One also stated that if an Omaha delegation explored the northern region and found it not to be "satisfactory and suitable," that the President would assign another tract within the land ceded in Nebraska not to

exceed "in extent three hundred thousand acres" to the tribe as a reservation.[19]

In other articles of the treaty the government promised to protect the Omahas from the Sioux, furnish them with mills and a blacksmith, and provide funds and land for a Presbyterian Mission. In turn, the Omahas agreed to pay the claims that Louis Sansoucci (but not Sarpy nor Fontenelle) held against them, permit future railroads or highways to be constructed through their reservation, exclude the use or sale of liquor on their lands, and commit no depredations against American citizens.[20]

Yet a major change was incorporated in Article 6 of the new treaty negotiated in Washington. Article Six provided that, at the president's discretion, "the whole or such portion of the land hereby reserved, . . . or such other land as may be selected in lieu thereof . . . (may) . . . be surveyed into lots . . . and (assigned) to such Indians or Indians . . . as are willing to . . . locate on the same as a permanent home." The article also stipulated that the acreage of the allotment each Omaha would receive should be based upon the individual's age, marital status, and size of his or her family. The president could, "in his discretion," issue patents to such landholders, but the allotments could not be "aliened" nor leased for longer than two years, and would be exempt from taxation, sale, or forfeiture until "a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions." After all eligible Omahas received allotments, "the

residue of the lands hereby reserved, . . . may be sold for their benefit, under such laws, rules or regulations, as may . . . be prescribed by the Congress or President. . . ." Article Six also included the provision that **"No State legislature shall remove the restrictions herein provided for, without the consent of Congress."**[21]

From the Omaha perspective, **the delegates who journeyed to Washington had no authority to negotiate a new treaty.** When the tribe negotiated the Gatewood Treaty, they had demanded that the agreement be negotiated at Council Bluffs by "the Chiefs, Headmen, Warriors and young Men of the Omaha tribe in general Council assembled." The Gatewood Treaty had been signed by fifty-nine leading chiefs and warriors of the tribe, not by a handful of representatives acceptable to the government. Moreover, prior to the departure of Gatewood and the delegates for Washington the Omahas had stipulated that **the delegates were empowered only to "slightly" modify the Gatewood Treaty, not negotiate a new one.** But Commissioner of Indian Affairs George Manypenny refused to accept the original agreement that Gatewood and the Omahas had signed. Indeed Manypenny completely discounted the Gatewood Treaty (and another agreement which Gatewood also had negotiated with the Otoes), stating that "the treaties, if they can be so called, are made in violation of law and are in my judgement such as ought not to be approved or sanctioned." In consequence, **Manypenny negotiated a new, not a**

"slightly" altered treaty with Omaha delegates who had not been authorized to agree to nor to sign such a document.[22]

The Omaha delegation returned to Nebraska amidst considerable confusion. Not only did the new treaty markedly alter the payment schedule for the Omaha land cession in Nebraska, it provided for the allotment of lands the Omahas would retain as a reservation. Moreover, the Gatewood Treaty stipulated that the Omahas would settle on lands north of the Iowa River, while the newer Washington treaty provided them with the option of either settling north of the Iowa River, or if such location was not "a satisfactory and suitable location" that they might select "a new location," . . . which shall not be more in extent that three hundred thousand acres of suitable extent . . . for the future home of said Indians."[23]

The Omahas were required to make a perfunctory exploration of the lands north of the Iowa River, and in November of 1854, a party of Omaha leaders and Indian agents traveled to the tract, but the Omahas absolutely refused to accept the lands. Instead, they informed the agents that they wished to claim approximately three hundred thousand acres stretching west from the Missouri River, bounded on the north by a line running due west from a point approximately five miles south of the mouth of Omaha Creek, and on the south by a line running due west from the mouth of Woods Creek. The western border of the tract was to be formed by a north-south line that intersected the southern boundary about

thirty miles due west of the mouth of Woods Creek, and continued north until it also intersected the northern boundary. This tract contained the famed Blackbird Hills and had been closely associated with the Omahas since their entrance into Nebraska.[24]

The Omaha selection of the Blackbird Hills site was motivated by their familiarity with the region, and by their fear that any settlement north of the Iowa River would be decimated by the Sioux. But their selection of the Blackbird Hill reservation was opposed by many local non-Indians. The region was opposite very fertile farmlands in Iowa and many potential settlers and land speculators had assumed that the Blackbird Hills and adjoining areas to the west would soon be opened for settlement. When they learned that the region would be included in the new Omaha reservation they flooded federal officials with protests.[25] In response, federal officials attempted to persuade the Omahas to accept a reservation near the Otoes, south of the Platte, but the Omahas refused. Finally, in May of 1855, Secretary of the Interior Robert McClelland authorized the Commissioner of Indian Affairs to establish a reservation for the Omahas at the Blackbird Hills. Although their villages were clustered near the Missouri River, they welcomed the opportunity to continue hunting over the entire reservation. The tribe now had a reservation home.[26]

But the Sioux threat continued. Indian Agent George Hepner, who replaced Gatewood, had earlier reported that if the Omahas were forced to take a

reservation north of the Iowa River, that he doubted "whether one (Omaha) would be left to tell their fate in twelve months," yet neither Hepner nor other officials believed that the Sioux would attack the Omahas south of the Iowa River. They were wrong. In May, 1855 a Sioux war party stole nine horses and killed an Omaha man on the western section of the new reservation, and when the tribe went west to hunt buffalo in July, Logan Fontenelle, who had served as one of the delegates to Washington and who had accompanied Hepner in the recent inspection of the proposed Iowa River reservation, was killed by the Sioux while hunting in modern Boone County Nebraska.[27] In response, the Omahas again retreated to the Platte River near Bellevue and did not return to the Blackbird Hills until May, 1856, but the protection promised by the government failed to materialize and Sioux attacks continued. Throughout the late 1850's and early 1860's the Sioux harassed the Omahas, who continued to hunt across western regions of the reservation. Meanwhile, the Omahas located their settlements near the Missouri River where the Indian agency, the Presbyterian mission, and non-Indian settlements such as Decatur offered at least a façade of protection.[28]

Initially, the Omahas clustered around three separate settlements. Win-dja-ge, dominated by Joseph La Flesche and later called "the Village of the Make-Believe White Men," was located close to the Presbyterian Mission, near the Missouri River, about two miles south of the modern Omaha-Winnebago

reservation border. The largest village, Bi-ku-do, was erected near the agency headquarters at modern Macy, and was home to more traditional tribespeople, many of whom continued to dwell in earth lodges. The third village, Jan-(th)ca-te, was at the southeastern corner of the reservation, just north across the border from modern Decatur.[29]

THE WINNEBAGO TREATY OF 1865

The Sioux were not the only Indians who illegally entered the Omaha Reservation. Following their forced removal from Wisconsin, then to Iowa, Minnesota, and finally South Dakota, in 1863 many Winnebagos (Ho-Chunks) abandoned their reservation at Crow Creek in South Dakota and sought sanctuary on the northern parts of the Omaha reservation. Although many Omahas had misgivings about the destitute newcomers, they allowed the Winnebagos to occupy bottom land along the Missouri and to plant several fields of corn.[30] The Omahas pitied the Winnebagos, who suffered severely during the winter of 1864-65, but they considered the Winnebagos to be an unruly people and complained that they stole Omaha horses. Yet the Winnebagos also served as a buffer against more dangerous attacks by the Sioux, whose continued depredations had prevented the Omahas from settling in the northern parts of their reservation. Federal agents were eager to settle the Winnebagos near the Omahas, and after some misgivings, the Omahas met in council and agreed to send delegates to Washington to "treat in

the sale of such portions of the present Omaha Indian Reservation, for the use of the Winnebago and Ponca Tribes of Indians, as they and the proper Authorities may agree upon. . . ."[31]

In March of 1865, a delegation of ten Omaha leaders met with officials in Washington and sold a tract of land encompassing approximately 97,500 acres within the northern tier of their reservation to the federal government to be used as a separate reservation for the Winnebagos. A proviso in the treaty stated that these lands could not contain any improvements erected by the Omahas, and that the Omahas would receive $50,000.00 for the tract which their agent could spend for goods, provisions, livestock, buildings, farm implements, and general agricultural instruction that would assist the Omahas in making "improvements on their reservation." Article Three extended the government's obligation to provide the Omahas with mills and a blacksmith for an additional ten years (as provided in the 1854 treaty), but Article Four contained the most controversial and confusing part of the agreement. Although of questionable legality, the 1854 treaty had listed provisions for allotting the Omaha reservation, indicating the amount of land to be assigned to each Omaha and stating that such assignments should be made according to age, marital status, and family size. The 1854 treaty also had regulated leasing of assigned lands and provided for the sale of "residue" lands remaining after the initial allotments had been made. Yet Article Four of the 1865 treaty provided for

a new allotment process in which the allotments to be awarded to individual Omahas would be considerable smaller. Instead of tracts of over 640 acres to heads of large families (as stipulated in the 1854 treaty), the 1865 treaty awarded only 160 acres of land to family heads, regardless of the size of their families. Single males over eighteen years of age were to be awarded only forty acres, which would include "in every case, as far as practicable, a reasonable proportion of timber." Six hundred and forty acres were to be blocked off surrounding the Omaha Agency and "assigned . . . for the use of the agency."[32]

In addition, Article Four of the 1865 treaty decreed that "the whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent . . . or the agent." Article Four also stipulated that the allotment of lands should be under the direction of the Secretary of the Interior, and "when approved by him, shall be final and conclusive." The Commissioner of Indian Affairs would issue "certificates" to the allottees and the allotments "shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules

and regulations as may be prescribed by the Secretary of the Interior." The allotments were to be "exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress."[33]

FIRST ATTEMPTS AT ALLOTMENT

By 1865 some Omahas were eager for allotment. They envisioned that private ownership of land was the only way to avoid removal to Indian Territory; but they were dumbfounded when they learned that the 1865 treaty provided a different allotment schedule than the treaty that had been negotiated in 1854. The 1854 treaty had called for allotment, and since federal officials had failed to implement these provisions, the Omahas assumed that any allotment of their remaining lands would be conducted under the 1854 treaty guidelines. They were angry when they learned that the new treaty provided smaller acreages. Indeed, after their return from Washington, all the delegates who had signed the treaty except the elderly White Cow (who had died) and Joseph La Flesche (the only delegate who could speak fluent English) wrote back to the President asking that the reservation be allotted under the 1854 treaty.[34]

Surprisingly, the Omaha delegates charged that when they were in Washington **federal officials had not even mentioned changing the size of the allotments.** In fact, the details of the treaty, including the new allotment schedule, were made known only to Joseph La Flesche (the only literate delegate)

who was provided with a copy of the document by Robert Furnas, the Omaha Indian Agent, who had accompanied the delegation to Washington. After reading through the treaty, La Flesche privately informed Furnas that he opposed the document's new allotment regulations. In response, **Furnas promptly promised him a bribe of $2000.00 to not discuss the agreement with other delegates.** La Flesche obviously accepted the bribe and did not inform the other Omaha delegates that the allotment schedules had been altered. With the exception of La Flesche, **the Omaha delegation returned to Nebraska assuming that any allotments on their reservation would follow the schedule as delineated in the 1854 treaty.** After the treaty was ratified, La Flesche demanded that Furnas fulfill his promise and pay the bribe, but Furnas (himself a member of a notorious "Indian Ring") refused to pay, accused La Flesche of being "a grand rascal and extremely selfish" and eventually banished him from the reservation, charging (ironically) that La Flesche was dishonest because he was guilty of "bribery."[35]

Meanwhile, pressure mounted in Nebraska to abolish the Omaha reservation and remove the Omahas to Indian Territory. In 1865, the lower house of the Nebraska territorial legislature passed legislation urging the forcible removal of all Indians from the territory in anticipation of Nebraska becoming a state. Correspondence flooded Congress inquiring just when the Omaha reservation would be sold, including inquiries from the "Bohemian Settlement Society"

which wished to purchase the entire reservation and colonize the region with thousands of Bohemian immigrants, both from the U. S. and eastern Europe.[36] Aware of this pressure, the Omahas repeatedly requested the government to provide them with allotments so they could remain in their homeland. Inclement weather, red tape, and bureaucratic bungling delayed the survey of the reservation for two years, but by August, 1867, the federal survey was completed. The acreage on the Omaha Reservation totaled 205,335 acres[37]

The task of assigning allotments to the Omahas fell to Edward Painter, who was appointed as Indian Agent to the Omahas in late April of 1869. By that date, many Omahas had become so frustrated with the government's failure to provide them with allotments that they were willing to accept the smaller tracts of land as provided by the 1865 treaty and even offered to pay for the survey of allotment boundaries from tribal funds. Those Omahas who wished to farm argued that they could not plant crops until their individual allotments were assigned, and even tribespeople who remained opposed to yeoman agriculture believed that individual allotments were less vulnerable to intrusion by non-Indians than large tracts of land held in common.[38]

Painter spent about two years (July, 1869-August 1871) assigning the initial Omaha allotments, but many of the Omahas remained dissatisfied and apprehensive. Disputes arose between Painter and the tribe over the eligibility of members of polygamous

marriages, single adult women, and children to receive allotments. In addition, some of the allotments assigned by the agent were located far from those given to other family members, or were on lands subject to erosion by creeks or the Missouri River. Other questions emerged over the eligibility of allottee's heirs, or the status of white men married to Omaha women.[39] By April, 1871, however most of the "certificates" of allotment were approved by officials in Washington and had been distributed to eligible allottees.[40] The Omahas had been assigned allotments. They were uncertain what to do with them.

THE UNSUCCESSFUL LAND SALE OF 1873

Anthropologists have argued that the Omaha interest in allotment was spurred more by the declining success of their annual bison hunt than by any growing interest in yeoman agriculture.[41] They continued to hunt on the prairies west of Logan Creek and considered the region to be an integral part of their reservation, but most Omahas still resided in closely-knit kinship communities closer to the Missouri River. Moreover, as the Omahas learned, it was almost impossible to farm their allotments without draft animals and farm implements. Since the Omaha annuity payment provided only about $14.00 per capita, even those Omahas who were willing to farm had little cash. In response, they asked Congress to sell approximately 50,000 acres of land within the western borders of their reservation to non-Indians who wished to settle in the region. The proceeds from

the sale of such reservation tracts could be used to purchase draft animals, farm implements or to finance the construction of homes and outbuildings on the allotments.[42] Congress initially failed to enact such legislation, but on June 10, 1872 Congress passed an act enabling lands **within** the Omaha, Pawnee, Sauk and Fox of the Missouri, and Otoe and Missouria reservations to be surveyed and appraised, then sold by the Secretary of the Interior. The tracts could be sold in either 160 acre parcels, or "the entire body of lands offered **within** any reservation may be sold to one purchaser, should it be deemed for the best interest of the Indians interested."[43]

This act passed on June 1872 differs markedly from the previous sale of lands by the Omahas to the federal government for use as a reservation for the Winnebagos. The 1872 Act contains no explicit reference or language indicating the total surrender of all tribal rights in the region. It does not contain any language indicating a relinquishment of title to the land in exchange for a specific sum of money, nor does it restore lands to the public domain. In addition, there was no indication that Omaha tribal members would not have access to the region following the passage of the 1872 Act, nor any indication what might happen to any individual acreages that were not sold.

In the late spring of 1873, federal officials put the newly appraised lands on the Omaha reservation on the market. Advertisements were placed in newspapers across the eastern United States listing

individual tracts, and stating that "These lands comprise the western part of the reservation of the Omaha tribe of Indians in the State of Nebraska." Obviously, both the Omahas and the federal government continued to envision the lands as part of the Omaha reservation, since bids for these tracts were to be sent to the Commissioner of Indian Affairs, not the federal land office, and **the lands were described and advertised as "the western part of the Omaha reservation."** If non-Indians purchased and settled on such properties, they would be moving onto the western section of the Omaha Reservation.[44]

Unfortunately for the Omahas, the appraised value of $2.50 per acre for their western lands attracted few purchasers and the initial sale of their western reservation tracts was quite limited. During the summer of 1873, with no funds from land sales to finance draft animals or equipment, many Omahas left their reservation for their final buffalo hunt on the plains. But the buffalo herds continued to shrink and when they returned, many Omahas faced an uncertain future. They no longer could hunt for a living, but the government's initial attempts to lure settlers onto the western sections of their reservation had proven unsuccessful.[45]

In 1882, nine years after the passage of the 1872 Act, when Congress discussed the sale of much of this same land prior to the passage of the 1882 Land Act, the 1872 Act was hardly mentioned. The lengthy debates that preceded the passage of the 1882 Land Act contain absolutely no indication that any member

of Congress believed that these same lands were not part of the reservation. Indeed, all of the discussion that occurred in regard to the region on the western one third of the Omaha Reservation illustrates that **in 1882, Congress considered the lands that were unsuccessfully offered for sale following the 1872 Act to still be part of the Omaha Indian Reservation.**[46]

THE WINNEBAGO TREATY OF 1874 AND UNSUCCESSFUL SALE OF LAND TO THE PONCAS

In response, Omaha leaders agreed to sell reservation lands to the Winnebagos and Poncas. Yet the Omahas envisioned these two transactions in different ways. In 1874 they reluctantly sold a single tract containing approximately 12,350 acres on the northeastern corner of their reservation **"to the United States in trust for the Winnebago tribe of Indians."** Clearly, the Omahas understood that this tract would no longer be part of their reservation. **The sale of this land to the United States contrasts sharply with the Act of 1872 and the Land Act of 1882.** In 1874 the Omahas relinquished all hegemony over this tract and agreed that it would become part of the Winnebago reservation. They did not sell individual allotments to the Winnebagos, nor welcome them into their midst.[47]

The Omaha proposal to sell lands to the Poncas was much different. Unlike the Winnebago land sale, the Omahas' attempt to sell individual allotments to

the Poncas resembled the unsuccessful offer by the tribe of lands to settlers on the western end of the reservation following the Act of 1872. Since almost no settlers had purchased land on the reservation, in November 1873 Omaha and Ponca chiefs met on the Omaha Reservation and the Omahas agreed to sell individual allotments to the Poncas within the same region that they previously had offered to non-Indians. The Omahas did not however, propose to relinquish hegemony over these lands. The Poncas would occupy land on the western sections of the Omaha reservation, but **the region would remain part of the Omaha reservation.**[48] Both the Omahas and the Poncas willingly agreed to this proposal, but federal officials intervened, forbade the Poncas from joining the Omahas, and made plans to remove the Poncas to Indian Territory.[49]

In summary, the Omaha sale of reservation lands to the United States for use by the Winnebagos differed markedly from their unsuccessful attempts to sell allotments to the Poncas. In the 1874 sale of lands which were added to the Winnebago Reservation, the Omahas explicitly surrendered all title to the lands that were sold and surrendered hegemony over them. The abortive attempt to sell allotments to the Poncas more closely resembles the unsuccessful sale of lands to non-Indian settlers following the 1872 Act. **In 1872, and again in their 1873 offer to the Poncas, the Omahas offered to sell individual acreages or allotments to non-Omahas who would then reside on the Omaha Reservation.**

THE PROGRESSIVE OMAHAS' REQUEST FOR A NEW ALLOTMENT

The decision to remove the Poncas reflected the federal government's intention to concentrate the tribes who occupied the southern and central plains onto reservations in Indian Territory. In 1868, at the Treaty of Fort Laramie, federal officials inadvertently awarded the small Ponca reservation along the Niobrara River in northern Nebraska to the Sioux, and although the government later admitted that it had made a mistake, it failed to return the lands to their rightful owners. In 1877, after Sioux incursions against the Poncas increased, officials used the pretense of "protecting the Poncas" to forcibly remove the Poncas to Indian Territory.[50]

The government's refusal to allow the Poncas to relocate to the Omaha reservation, and the Poncas' subsequent removal frightened the Omahas. Many Omahas had relatives or friends among the Poncas in Indian Territory who sent word back to Nebraska that the new lands in the South were arid and barren, that the region was rife with illness, and that the Poncas were sick and dying.[51] Envisioning the Ponca removal as a precursor of their own fate, progressive Omaha leaders sent letters and petitions to eastern reform organizations reiterating their determination to remain in Nebraska.[52] Meanwhile, other problems plagued the Omahas and seemed to cloud their future. In June of 1879, the Bureau of Indian Affairs (BIA) combined the Omaha and Winnebago agencies, and moved the new combined agency office north to

the Winnebago Reservation. Omaha leaders complained that Howard White, the new agent for the combined agency, spent all his time among the Winnebagos and neglected the Omahas, a negligence that also fueled rumors that Omaha tenure in Nebraska was limited.[53] In addition, many of the allotments assigned by Edward Painter in 1869-1871 were ill-chosen and remained unoccupied. Some contained "land too much broken for purposes of agriculture" while others had been severely eroded by the Missouri River. In some cases Omahas were assigned allotments located far from their friends and/or relatives, while others who had been assigned allotments attempted to exchange them. By 1875 some allotments already were abandoned while others were being traded back and forth among various tribal members.[54]

Joseph La Flesche and other "progressive" Omahas championed allotment as a hedge against removal since the assignment of allotments gave each Omaha a defined tract of land on the reservation which they could specifically claim as their own. Even if federal officials forced less progressive or unallotted members of the tribe to remove, those Omahas with allotments would have individual tracts of land that they could use as a land base to remain in Nebraska.[55] Fearing removal, La Flesche and his allies sought reassurance that the allotments which they accepted really were their own. To their dismay, both local attorneys and officials in the Indian Office informed them that the "certificates" distributed by Edward

Painter which delineated their allotments were not legal titles and were worthless in both state and federal courts. Incensed, Omaha leaders accused the federal government of betraying their trust and providing them with "titles (that) are not good." As pressure for Omaha lands mounted, the progressive Omahas demanded legal titles to their allotments, asserting that, "We work the land and we wish to have good titles to it."[56]

Ironically, the turmoil and uncertainty that swirled through the Omaha tribe during the 1870's was not reflected in the "official" reports that agents sent to the Indian Office during these years. Bureaucrats eager to further their own career reported that "no tribe of Indians in this Superintendency are making the advance and progress in agriculture that the Omahas now are. . . It is really wonderful and is mainly owing to the judicious management of their agent." Or "they are a steady and reliable set of men . . . advancing in the direction of citizenship . . . (who) want to stay at home and cultivate their farms and learns white men's ways.[57]

But evidence suggests that the Indian agents were describing the "progressive" minority of Omahas led by Joseph La Flesche and other Omahas of mixed lineage, not the majority of the tribe. The vast majority of Omahas were illiterate at this time. They left no written record of their opinions on allotment or land sales. Yet comments by Alice Fletcher[58] and reports from Presbyterian missionaries resident among the tribe or by the many Omahas who still wished to

follow the old ways reveal that the majority of Omahas had accepted allotments, but had no intention of farming them. Moreover, they wished to retain their reservation. Although Presbyterian missionary William Hamilton also encouraged the Omahas to accept yeoman agriculture, his career was not dependent upon optimistic appraisals of the Omahas "progress." Unlike federal agents, in April 1878 he reported that the majority of Omahas "want to keep their tribal relations, continue to be Indians and live as Indians." Many of these more traditional Omahas "wish to keep their reserve" although Hamilton believed that some of their chiefs might be persuaded to go to Indian Territory if the government would support them there.[59] Meanwhile, many of the more traditional Omahas harassed those progressives who attempted to farm their allotments and complained that only "La Fleche and forty men (who side) with him desire to live as white men;" the rest of the Omahas were unwilling to do so. According to a Maqpiya-qaga, a spokesman for the traditionalists "We hate those who live as white men . . . for those who live as white men desire to abandon the(ir) life as Indians."[60]

THE SALE OF THE RAILROAD RIGHT OF WAY

Although the Omahas disagreed among themselves over the retention of the reservation and the acceptance of white men's ways, they did agree to the construction of a railroad across their reservation.[61] In the Treaty of 1854, the Omahas consented to allow

railroads to construct a right of way across their reservation in return for "a just compensation," and in 1880 they agreed to grant the Sioux City and Nebraska Railroad a right-of-way not exceeding two hundred feet in width from the northern edge of their reservation, following Middle Creek to its juncture with Logan Creek, then generally southeastward down the Logan Creek Valley until it crossed the southern boundary of the reservation. The railroad promised to pay the Omahas $7.00 per acre for the right-of-way and for two small plots of ten to twenty acres apiece for stations or depots to be located where the line intersected the reservation boundaries. The railroad also agreed to reimburse the tribe for any stock killed or damage caused by prairie fires due to the line's operation.[62]

The Omahas' decision to sell the right-of-way to the railroad reflected the tribe's economic straits in the late 1870's. Annuity payments remained small and the federal government still had not paid the Omahas all the money it had promised in the 1854 treaty. They had sold land to the Winnebagos and offered land to the Poncas in an attempt to gain enough resources just to survive, but many Omahas continued to barely eke out an existence. The progressive minority was particularly eager to acquire cash or farm equipment to develop their allotments, even if they had to sell some lands on the Omaha reservation to non-Indians.[63]

A LEGISLATIVE HISTORY OF THE LAND ACT OF 1882

Alice Fletcher was the catalyst who facilitated the sale of additional lands on the western portion of the Omaha reservation. She also implemented the further allotment of reservation lands. In 1881, after meeting with Thomas Tibbles and his wife Susette (the daughter of Joseph La Flesche) in Boston, Fletcher, a budding ethnologist, accompanied the Tibbles back to the Omaha reservation. She spent much of the fall and winter of 1881 amidst the Omahas, and like many eastern reformers she maintained a patronizing attitude toward Native Americans, referring in her correspondence to the Omahas as "her children – her babies:" people incapable of making their own decisions.[64] Moreover, most of Fletcher's contacts were with the La Flesche family and other members of the progressive faction,[65] and she generally equated the aspirations of the progressive minority with those of the entire Omaha tribe.[66] In December 1881, she met with Joseph La Flesche and other progressive leaders who asked her for a "strong paper" or act of Congress to guarantee their lands and prevent their removal to Indian Territory. As historian Judith Boughter has pointed out, in their reference to a "strong paper," most Omahas wanted a Congressional guarantee of their reservation homelands in Nebraska, not allotments nor the sale of additional reservation lands, but Fletcher assumed they were asking for legal title to their allotments, which she envisioned as a key to their

acquisition of private property and other Anglo-American cultural patterns. After additional meetings with the progressives, Fletcher helped them draft and send a petition to Congress asking for "a clear and legal title" to their allotments.[67]

The request struck a responsive chord among politicians from Nebraska. Patterning his legislation after the abortive Act of 1872, in December 1881 Senator Alvin Saunders of Nebraska already had introduced a bill (S. No. 200) into the Senate which proposed the sale of Omaha lands. The bill had been read twice, then referred to the Committee on Indian Affairs.[68] Encouraged by Fletcher's support, in February 1882 Saunders reported the bill (now numbered S. No. 1255) back from the committee where it was again read twice on the floor of the Senate, then recommitted to the Committee on Indian Affairs.[69] Two months later, on April 19, 1882, Saunders again presented and explained the bill, with two amendments, on the floor of the Senate. Saunders admitted that the sale of lands on the western section of the Omaha reservation had been proposed before. According to Saunders, "This subject has been in various shapes before the Senate for some length of time, the effort being to get a bill that would meet the wants of the Indians and at the same time give satisfaction to the government." Saunders summarized the bill by stating that it "authorizes the sale of not exceeding fifty thousand acres, to be taken from the western part of the Omaha reservation," and that he believed the bill to be "one of those few cases" in which

everyone was satisfied, since it provided the Omahas with funds from the sale of the lands, met the demands of local settlers who wanted access to the lands, and had the blessing of the Indian Department.[70]

On April 19th, five amendments were added to the bill. These amendments shifted the location of the sale of these reservation lands from the Indian Agency at Winnebago to the Public Land Office in Neligh, Nebraska; added a minor word change in section 2, line 6, inserting "under such instructions as the Secretary of the Interior may issue;" deleted any reference to the removal of the Omahas from the state of Nebraska; required purchasers of reservation lands to pay a $2.00 service fee at the land office; and limited the sale of reservation lands so that "not more than one hundred sixty acres of said land shall be sold to any one person."[71]

More important to an understanding of the status of the lands west of the railroad right of way however, was the discussion that ensued when Senator John James Ingalls from Kansas inquired if Omaha allotments taken in that region would be subject to taxation by the state of Nebraska. In response, Senator Henry Dawes from Massachusetts argued that such would not be the case, since otherwise an individual Omaha with allotments would be vulnerable to "a sharper or anyone with whom he may deal", and that "in a very few months he would be stripped naked as a bird."[72] After some discussion regarding the power of the federal government to

continue to restrict reservation land after it was allotted to tribal people, Senator William Allison of Iowa asked Senator Saunders of Nebraska "if it is contemplated in this bill that Indians will become the purchasers of any portion of this tract of land" (i.e., the region west of the railroad). In reply, Saunders initially responded that he did not think that "an acre of this land will be sold to the Indians,." but Senator Dawes immediately challenged Saunders' assessment, pointing out that

> "the Senator from Nebraska has overlooked the fact that underlying all of this the treaty stipulations with these Indians is that at any one of them can go on any part of the present reservation, and is entitled to a patent, or what is equivalent to a patent; it is not called in the treaty a patent, but is equivalent in effect to a patent of 160 acres of land."[73]

Senator Allison then asked that if land in the region west of the railroad was simply purchased ("in case they buy these lands as other people buy them") by the Omahas, rather than selected as an allotment, would such purchased land also would be immune from state taxes. At this point Senator Saunders interrupted and read a letter (dated December 30, 1881) from Arthur Edwards, the Omaha Indian Agent, stating that no Omahas currently were living in the region west of the railroad, nor had they made any improvements in the region. Yet this information seemed to have little influence on the subsequent debate since Senator John Morgan of Alabama and

Senator John Ingalls of Kansas continued to focus their inquiry upon the taxation of lands in the region west of the railroad, should such acreages be purchased by the Omahas. Within the context of the debate, Senator Ingalls described the region as **"Take the case of this bill where the land is confessedly land in an Indian reservation, and is to be sold to Indians or whites."**[74]

After listening to this extended debate, a frustrated Senator Saunders interjected "I think there is probably not a full understanding with some Senators as to exactly how this matter stands." According to Saunders, the Omahas had 150,000 acres of land in their reservation. They were living on the eastern part of it. If the western sections of the reservation were sold, the Omahas still would have more than enough land for themselves. No one was currently living on the western part of the reservation and it should be sold. But Saunders dramatically changed his position in regard to the future Omaha occupancy of the land. Although he earlier had stated that he did not expect one acre of land to be sold to an Omaha, he now agreed that they should have access to the region. Since the land was being sold for their benefit, the Omahas should be able to purchase individual acreages west of the railroad. According to Saunders, **"So, then, if they want to buy any of it, they ought to be treated really like just like any other persons, so far as the land is concerned.**[75]

During the rest of the afternoon, Saunders continued to defend the bill on the floor of the Senate.

When Senator Omar D. Conger of Michigan asked why the lands being sold were located on the western, more fertile region ("the cream of all that reservation . . . the best farming land in that region") of the Omaha reservation and why the Omahas would be left with the more hilly, less fertile eastern sections, Saunders assured Conger and other senators that he had visited Omahas residing east of the railroad right of way "a few years ago (and) found several of these Indians selling four or five hundred bushels of corn, and they have just as good lands left as these (the lands west of the railroad) are." Still concerned that some Omahas already had chosen allotments on reservation lands west of the railroad, and that these lands might eventually be subjected to state taxation, Senator Dawes proposed an amendment to section four of the bill "That any right in severalty acquired by any Indian under existing treaties should not be affected by this act." Dawes agreed however, that if the bill was passed and lands west of the railroad were sold to private individuals, that such purchased land would be unaffected by the proviso.[76]

On the following morning, April 20, 1882, the Senate resumed its consideration of the Omaha Land Sale bill (S. No. 1255). Senator Saunders opened discussion of the bill by stating, "On reflection, I have come to the conclusion, so far as I am concerned, that it would be well to adopt the amendment offered by the Senator from Massachusetts" (Senator Dawes). In other words, Saunders was willing to allow any treaty restriction that applied to the Omaha reservation as

a whole (temporary immunity from taxation, lands held in trust by the federal government, etc.) to be applied to individual allotments that would be awarded under S. No. 1255. Saunders stated that he was eager to see the bill passed, and believed that broader issues of taxation, federal trust of lands in severalty, etc., would eventually be decided by another bill currently before the Senate, which would have a much wider application to tribes across the United States.[77]

The Secretary of the Senate then read Dawes' amendment, but it was immediately challenged by Senator James Beck of Kentucky, who was absent on the previous day, and who asked that the amendment be explained. In reply, Senator Dawes indicated that some questions still remained over whether any Omahas previously had chosen allotments west of the railroad, and that the amendment was designed "to make it perfectly safe and preserve the rights of any Indian who may have located upon this land." Beck argued however that the federal government should chose allotments for the Omahas to ensure that the best lands were distributed to Indians and then extend immunity from state taxation to them, regardless of these allotments' locations. Beck immediately encountered opposition from Senator Charles Jones of Florida who pointed out that the lands west of the railroad "may be purchased by white people, as well as by Indians; they are to be put up to the highest bidder and sold for the benefit of the tribe. **It is understood that an Indian has the right of**

purchase the same as a white man with respect to the land."[78] Like most other senators participating in this discussion, Jones believed that the region west of the railroad would be open to Omaha settlement; moreover, he was concerned about the future tax structure of the region. Assuming that Omaha tribespeople would move into the region, he argued that if they **purchased** land in the region, they would be vulnerable to state taxation. According to Jones, "if you undertake to sell the Indian lands, and to permit the white people to buy them and settle side by side with the Indians, and thus consolidate and unite these two populations together, you cannot apply one rule to one and another to another."[79]

Jones' assumptions about Omaha access to lands west of the railroad were echoed by Senator Mathew Butler of South Carolina who then asked Senator Dawes:

> I wish to ask the Senator from Massachusetts a question. I understand from him that it is proposed to sell about fifty thousand acres of this reservation to anybody who chooses to purchase, Indian, white man, or anybody else. Do I understand that the Senator proposes to protect an Indian who purchases part of that 50,000 acres and takes it in severalty – does he propose to exempt that Indian from taxation?[80]

In response, Dawes replied that his amendment applied only to lands taken as allotments under the bill, not to any lands purchased by individual

Omahas within the lands west of the railroad. According to Dawes, "If an Indian buys like a white man any portion of the 50,000 acres, . . no one supposes that he ought to be upon any other ground than a white man who purchases it."[81]

Following Dawes' explanation, Senator Alvin Saunders of Nebraska supplied the Senate with Indian Department statistics regarding the size of the Omaha reservation (143,225 acres) and the Omaha population (1,121 Indians) and again assured the Senate that the Omahas wished to have the lands sold, that they were receiving a fair price, and that the land west of the railroad "was a first class country, that the land will bring a good price, and that it ought to be sold and put into cultivation." The Senate then passed Senator Dawes' amendment. On April 20, 1882 the bill (S. No. 1255) was read before the Senate a third time, and passed.[82]

On May 12, 1882, Senate Bill No. 1255 was read twice before the House or Representatives, then referred to the Committee on Indian Affairs.[83] Six weeks later, on July 1, 1882, the bill, with amendments, was reported back from the Committee on Indian Affairs, and was then referred to the Committee of the Whole. The bill and amendments also were printed.[84] On July 26th, Kansas Congressman Dudley Haskell, who spent considerable time and effort in drafting the House's version of the bill, reported it back from committee where it was read on the floor of the House.[85] The bill had the strong support of Nebraska Congressman Edward Valentine, the

Chairman of the House Committee on Agriculture, and a leading advocate of small farmers; Kansas Congressman Dudley Haskell, the Chairman of the House Committee on Indian Affairs; and Hiram Price, a former congressman from Iowa who less than a year previously (in 1881) had been appointed as the Commissioner of Indian Affairs. According to Haskell, the bill was "the perfection of Indian legislation as recommended by Secretary Kirkwood (Secretary of the Interior Samuel Kirkwood – also from Iowa) and the present secretary (recently appointed Secretary of the Interior Edward Teller), and by all the Indian officials who have been concerned with the business."[86]

Not all Congressmen shared Haskell's perspective. Congressman Alfred Scales of North Carolina immediately asked that the bill be explained, while Congressman William Holman of Indiana suggested that the bill was designed to transfer the Omaha lands into the "hands of speculators." In reply, Haskell described the Omahas as "intelligent, capable, hard-working, and upright. It has been stated with a great deal of truth that they are the most advanced and enlightened of the Indians tribes west of the Missouri River." Indeed, according to Haskell, "not a single Indian Nation out of the dozens that have applied to us has so unanimously asked (for) this character of legislation as have these Omaha Indians." This "perfection of Indian legislation" had resulted from "their earnest desire and prayer," and because "they have a great deal more land than they need." They would, of course, be given allotments,

and after they received their fair share, the fifty thousand acres of reservation land west of the railroad would be sold.[87]

Yet Haskell admitted that his primary focus in drafting the bill was in the sale of the lands on the western end of the Omaha Reservation. As Haskell proudly pointed out:

> Now, as to the other side of the case – the disposition of the lands to white settlers. This portion of the bill I drew myself with special care, having some knowledge of the disposition of public lands, so that not an acre of this land shall go to any white person by purchase, unless he be the actual occupant of it, living upon it, improving it, making it his home. In no case can one man secure more than one hundred and sixty acres.[88]

But Haskell's critics still were not satisfied, and when Congressman William Holden inquired if "the selection of tracts by the Indians is to be a voluntary act of their own and not by the commissioners," Haskell readily agreed that they could "make their own selections in their own behalf and for their own children."[89] **(Later events would prove this guarantee to be false. Many Omahas opposed to the allotment process were forced by Alice Fletcher and federal officials to accept allotments against their will. See page 57 below.)** Congressman Olin Wellborn of Texas then asked if allotments could be selected anywhere on the Omaha reservation

before the sale of any lands took place. Haskell quickly replied in the affirmative, but he was immediately challenged by Senator Alfred Scales of North Carolina who closely examined the bill and its amendments, and who interjected that "The gentleman (Haskell) is mistaken in that."[90]

A short discussion then ensued over the continued confusion regarding the total acreage in the Omaha reservation and the population of the Omaha tribe, but the focus soon shifted to a comparison of the lands both east and west of the railroad, and as Congressman Richard Townshend of Illinois put it, if the region west of the railroad "is the most valuable part of their (the Omahas') lands, why do you seek to sell it." Haskell replied that timber was "the great desideratum in Western lands" and since the lands near the Missouri River were timbered, that was where the Omahas preferred to live, but according to Haskell, "any Indian who wishes to take his piece of land to the west of the railroad can do so."[91]

Opponents of the bill still remained suspicious however, and Congressman Henry Neal of Ohio questioned whether the minimum price of $2.50 per acre was too low since western lands seemed to be appreciating in value. Haskell replied that unless the reservation lands were developed, they would not appreciate and Neal seemed satisfied, but Congressman Scales then delivered a lengthy speech stating that he had closely examined the bill and had come to the conclusion that:

> whatever the object of the Committee on Indian Affairs (chaired by Haskell) was, or whatever might be the object the gentleman from Nebraska (Valentine) had in view, this (bill) in effect, if passed by this House would be nothing more nor less than a swindle upon the Indians; and I say this sir, without meaning any personal offense to anybody who is interested on the other side.[92]

Scales then followed with a description of the Omaha reservation supplied by Arthur Edwards, a local Indian agent which vividly contrasted the fertile lands of the Logan Creek watershed with broken lands abutting the Missouri River. According to Scales, the agent had pointed out that:

> In traveling over the reservation the other day, especially that part lying on the Logan, I could not help being impressed with the untold wealth that lay before me: pasturage sufficient for thousands and thousands of head of stock; a fine stream of water running at my feet . . . there is no end to grass anywhere except on the border of the Missouri. The reservation is one grand prairie – one great stock raising country, where if a white man had a title – Mr. Speaker, here I think is the milk in the coconut – The reservation is one grand prairie – one stock raising country, where if a white man had a title to three hundred acres of land he could not help becoming wealthy in a very few years.[93]

Haskell obviously was shaken by Scales' assertions and in frustration first claimed that the report

Scales had quoted described 50,000 acres **east** of the railroad, then stated that the description was inapplicable since it described the reservation land unsuccessfully marketed by the federal government following the 1872 act and "does not apply to the present bill." In reply, a determined Scales quoted from the same report which claimed that although Omahas wanted to sell 50,000 acres on the western end of their reservation, they did not want to sell it to the Poncas, "but might be induced to dispose of it to white men."[94] **(Of course, documentary evidence, including a joint plea in 1873 for such a sale from both the Omahas and the Poncas indicates just the opposite, i.e., that the Omahas offered to sell lands on their reservation to the Poncas, but obviously the Indian Department and politicians from Nebraska and Kansas wanted the lands opened to white men. See page 23 above.)**

Attempting to support his political ally, Congressman Valentine of Nebraska rallied to Haskells' defense. In reply to Scale's quote that the Omahas had refused to sell to the Poncas, but might be induced to sell reservation lands to white men, Valentine boldly interjected: "Exactly; that is right."[95]

If Valentine thought that his affirmation of the Indian agent's claim that the Omahas were ready to sell their lands and could be **"induced"** to sell them to white men would silence Scales, he was sorely mistaken. Scales evidently envisioned Valentine's statement as an admission that the Omahas had been pressured or misled into agreeing to sell their lands,

and he lashed out at Valentine, Haskell, and the entire Indian Department.

> Induced to sell to white settlers! What does that mean? Shall I tell this House? Shall I tell the country what that means? Shall I call the attention of this House to transactions occurring every day in negotiating treaties, and which ought to call the flush of shame to the brow of every man who had anything to do with it?[96]

Scales then reminded the Houses that in a former treaty the Utes supposedly had been "induced" to sign the document because the commissioners "provided a pound of striped candy for each buck Indian in order to be certain of his assent." Scales declared that such practices were "done more or less in all cases," and asked "What does assent mean? Will you tell me that you do not know? You do know what it means." Charging that assent was "obtained too often by whiskey, striped candy, a few dollars, and such gewgaws and trifles as catch the eye of the savage," Scales asserted that "you all from the West know it; my Kansas friend (Haskell) knows that is what it means."[97]

Scales then avowed that he did not oppose the allotment process, and that he realized that politicians from Nebraska envisioned the Omaha reservation as a barrier to progress. Indeed, he admitted that if he lived in Nebraska he too might "desire that these Indians who seem to be a wall in the path of the country's progress should be out of the way," but he

still believed that the sale of the best farm land on the Omaha reservation reeked of a conspiracy. As Scales pointed out:

> But excuse me; when the Committee on Indian Affairs goes so far; or when the Secretary of the Interior goes so far; or when the Commissioner of Indian Affairs goes so far in allotting these lands as to take from the Indians the best lands that they have, according to all estimates, the only land fitted for agricultural purposes, for that pursuit in which you have boasted that your civilization of the Indian has been perfect heretofore – excuse me if I cannot go to that extent.[98]

Scales continued:

> Do not let the Government, in the name of all that is just, take it away from them under the guise of having obtained their free consent. This is the most shameful fraud of all. No, no; do not say that. If you adopt such a measure, say frankly that you take their lands by force for the white man, and leave the question in that shape as the result of force without consent.[99]

Taken aback by Scales' charges, Valentine tried to shift the focus of the debate to Scales' reliance on the Indian agent's report and questioned the accuracy of the agent's portrayal of lands east of the railroad. Since the agent had described the bluffs abutting the Missouri River as "broken and mountainous," Valentine discounted such descriptions and claimed that the eastern segment was "Like the counties of Burke

and Washington that lie to the south of it; and these counties are considered to be two of the best agricultural counties in Nebraska."[100]

Yet when Valentine qualified his assertion by admitting that the lands on the eastern side of the reservation were, perhaps, "not quite as level" as the lands west of the railroad, Scales interrupted him and asked if he would permit the government to only sell lands in that region (the eastern section), rather than west of the right of way. Backed into a corner, Valentine hypocritically responded, "I would prefer it, if I were going on the land to farm." Seizing upon Valentine's answer, Scales sardonically replied "If any part of the reservation is to be sold, I will give my consent to that part (the eastern section) if it would be satisfactory to the gentleman (Valentine)."[101]

Valentine provided a clever response. He informed Scales that it was "not his consent we are asking. It is the consent of the Indians that we desire; and the Indians wish to retain the eastern part. You cannot find a single Indian of that tribe who will consent to the sale of the eastern part of the reservation." Valentine then argued that the Omahas were "not the wild untutored Indians that the gentleman from North Carolina talks about;" but highly civilized Omahas with farms, good houses, "neat and clean" families, and dedicated to educating their children. Valentine then produced a speech delivered by Joseph La Flesche in January, 1882 in which **this leader of the progressive faction of the tribe *did not support the sale of any land upon the***

reservation, but did indicate that La Flesche and his followers wanted allotments.[102]

The impasse between Valentine and Haskell, and Scales was broken by Congressman William Holman of Indiana, who introduced a two-part amendment to Section Eight of the bill which provided that no land on the reservation would be sold "until the allotments shall be made to the said Indians under the fifth section of this act" and that "said Indians, or any part of them, may, if they so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east or west of said right of way mentioned in the first section of this act." The discussion then focused upon jurisdictional issues and the source of funds to pay the commissioners who would appraise the lands to be sold on the reservation. Further discussion of allotment and lands on the reservation was tabled until the following day.[103]

On July 27, 1882, the House resumed consideration of S. No. 1255. The discussion immediately focused upon the amendment proposed by Congressman Holman. Holman informed the House that it was his intent that the word "all" should be inserted into the first part of his amendments so that the amendment would read that no lands could be sold until ***all*** lands had been allotted. Congressman Valentine objected, pointing out that he was willing to agree to the second part of the amendment allowing Omahas to take their allotments anywhere (east or west of the railroad) on the reservation, but if the sale of lands was prohibited until all Omahas received their

allotments it might postpone the sale of any lands for a lengthy period, since Omaha children "will not be able to make their selection for a great many years." Initially, Holman seemed reluctant to modify the amendment, but when both Haskell and Valentine vowed to support the bill only if the first clause was omitted, he agreed. Congressman Scales objected to the deletion, but the House eventually voted to accept the amendment and passed the amended bill by a vote of 105 yeas, 65 nays, and 119 not voting.[104]

The Senate bill (S. No. 1255), now amended by the House, was laid before Senate on July 29, 1822. Senator Alvin Saunders immediately objected to the House amendment and the bill was referred to a joint committee of the House and Senate.[105] Senate members of this committee were Saunders, Henry Dawes of Massachusetts, and George Pendleton of Ohio. House members were Dudley Haskell of Kansas, James K. Jones of Arkansas, and Oliver Spaulding of Ohio. After conferring in committee, Senator Saunders obviously withdrew his opposition, and on August 3, 1882 the bill, as amended by the House, was approved.[106] On August 7, 1882, President Chester A. Arthur signed Senate Bill No. 1255 and "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians, in the State of Nebraska, and for other purposes" became law in the United States.[107]

In summary, the legislative history of the Land Act of 1882 illustrates several things about the act, the Omaha Reservation, and Congressional attitudes

toward both the legislation and the reservation. First, an analysis of the discussion and debate in both the Senate and the House indicates that most members of Congress who participated in these discussions believed that the region west of the railroad would continue to be occupied by Omaha tribespeople after the Act had been passed. Indeed, the focus of much of the debate in the Senate was upon how Omaha residents west of the railroad would be taxed following the passage of this legislation. Members of Congress seemed to believe that in addition to allotments, individual Omahas also would purchase lands west of the railroad, for much of the discussion in both the Senate and House centered upon the status of such lands, in contrast to any allotments the Omahas might select in that region. Obviously, with few exceptions (Senator Alvin Saunders and Congressman Edward Valentine – both politicians from Nebraska), no member of Congress asserted that Omahas would not reside in the region west of the railroad. **The railroad right of way was not envisioned by Congress as a dividing line between Omaha and non-Indian land. The lands west of the right of way were envisioned by Congress as still part of the Omaha reservation.**

Congress took particular action to guarantee that the Omahas would have access to the lands west of the railroad. When politicians from Nebraska (again, Senator Saunders and Congressman Valentine) suggested that the Omahas did not want or would not have access to the region, Senator Henry Dawes of

Massachusetts, and Congressmen William Holman of Indiana and Alfred Scales of North Carolina rose in their defense and championed their right to select allotments or purchase lands in any part of the reservation. Both Dawes and Holman introduced specific amendments designed to insure that the Omahas would have the right to select allotments anywhere on the reservation, including the region west of the railroad. Both amendments passed and became part of the Land Act of 1882. Obviously, **Congress believed that the region west of the railroad would continue to be part of the Omaha Indian Reservation.**

The discussion and recorded conversation regarding the passage of the 1882 Land Act indicates that no member of Congress believed that the land west of the railroad had been sold, nor the reservation diminished by the abortive 1872 Act. In 1882, references by members of Congress to the region west of the railroad repeatedly refer to this region as still part of the Omaha Indian Reservation. Even Senator Alvin Saunders and Congressman Edward Valentine, leading proponents of opening this region to settlement in 1882, repeatedly referred to the region west of the railroad as part of the reservation. Moreover, Valentine's comments indicate that the proposed sale of reservation land following the 1872 Act had failed. Commentary indicating that other members of Congress still envisioned the region west of the railroad to be part of the Omaha reservation can be found scattered throughout the discussion of the 1882 Land

Act recorded in Volume XIII of the CONGRESSIONAL RECORD.[108] **The 1872 Act did not diminish the Omaha Indian Reservation.**

During the debates over the 1882 Land Act, the discussion of the total acreage of the Omaha Indian Reservation and the acreage contained in the reservation lands west of the railroad continued to reflect the confusion among federal officials and members of Congress over the total acreage encompassed in both the reservation and the amount of land to be sold. Estimates of the total acreage on the Omaha reservation ranged from Dudley Haskell's estimate of 143,000 acres[109] to Congressman Alfred Scales' inflated figure of 180,000 acres,[110] although most members of Congress who ventured an estimate seemed to thinks the reservation encompassed about 150,000 acres (more or less).[111] The most precise figure came from Commissioner of Indian Affairs Hiram Price, who reported that the reservation, prior to the 1882 Land Act, contained 143,225 acres.[112] Figures for the total acreage offered for sale also range by as much as twenty percent. Both Dudley Haskell and Alfred Scales reported that 40,000 acres of reservation lands would be put on the market,[113] while Henry Dawes and Alvin Saunders estimated the lands west of the railroad to be 50,000 acres.[114] Edward Valentine, perhaps hoping to attract settlement into the region, estimated the lands west of the right of way to exceed 50,000 acres.[115] Although the land had been surveyed, the total acreages remained uncertain.

Congressional debates and discussion focusing upon the passage of the 1882 Land Act also suggest that the bill was designed by two powerful and converging interest groups. One group, comprised of western politicians such as Alvin Saunders, Edward Valentine, and Dudley Haskell wished to see as much land in Kansas and Nebraska opened to white settlement as possible. It is not surprising that Saunders, a Senator from Nebraska, and Haskell, a Congressman from Kansas, both labored diligently to pass this bill through their respective branches of Congress. Haskell served as the Chairman of the House Committee on Indian Affairs, and as he boasted during the debates on the bill, he was proud that he personally formulated those sections of the Act that dealt with "the disposition of lands to white settlers."[116] As the CONGRESSIONAL RECORD indicates, Haskell worked hand in hand with Nebraska Congressman Edward Valentine to maneuver the bill through the House,[117] while Saunders used all his influence to push the bill in the Senate.[118] When the amended House bill was returned to the Senate for the upper house's approval, Saunders at first objected to the amendment added by the House which permitted Omahas to select allotments anywhere on the reservation, and asked that a joint committee of both houses be called to reconsider the bill and its amendments. Both Saunders and Haskell served on the six person committee formed by the Senate and House which reconsidered the bill, and after conferring with Haskell, Saunders dropped his opposition and the bill was returned to the Senate and passed.[119]

The second powerful group which labored for the passage of the 1882 Land Act was the Indian Department. Spurred on by eastern reformers such as Alice Fletcher, they were eager to push allotment upon the Omahas and other tribes, and in this case they were led by Commissioner of Indian Affairs Hiram Price, who, Saunders reported, helped design the bill and gave it his blessing.[120] Saunders' acquiescence in accepting the amended bill which would allow the Omahas to select allotments, or even to purchase lands west of the railroad may have been due to Price's intervention. As the discussion and debates recorded in the CONGRESSIONAL RECORD indicate, Congress was willing to allow individual Omahas to choose allotments west of the railroad, and even to purchase lands in that region if they were willing to pay taxes. By his own admission, Saunders initially did not anticipate that any Omahas would settle there and he had opposed their occupancy in the region west of the right of way.[121] Yet, after he met with Haskell and the other members of the joint Senate-House committee, he changed his mind. Why? Subsequent decisions rendered by Commissioner of Indian Affairs Hiram Price regarding the accessibility of lands west of the railroad after the 1882 Land Act passed may offer some insights into Saunders' supposed change of heart. These events are discussed on pages 60-64 below.

In conclusion, the legislative history of the Land Act of 1882 illustrates that Congress did not discuss the total surrender of tribal rights in the region west

of the railroad. There was no discussion in Congress of the Omaha tribe surrendering their rights to reservation lands west of the railroad for any specific sum of money. There is no indication that Congress expected that Omaha lands would become part of the public domain. In contrast, much of the discussion in the Senate focused upon how those Omahas who might choose allotments or purchase land west of the railroad would be subject to state taxes. **The legislative history of the Land Act of 1882 indicates that such legislation did not diminish the Omaha Indian Reservation.**

THE LAND ACT OF 1882: AN EVALUATION

The Land Act of 1882, "An act to provide for the sale of part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes," stipulated that lands on the Omaha reservation located west of the Sioux City and Nebraska Railroad right of way would be surveyed and either allotted to Omahas, or sold to individual settlers in tracts no larger than 160 acres. Potential purchasers were obligated to settle on the tracts, make improvements, and pay one third of the total price (plus five per cent interest) of the tract one year after they entered onto the lands. The second third of the purchase price (plus five per cent interest) was to be paid one year later, and the remaining third of the original purchase price (plus five percent interest) was to be paid by the third anniversary of the settler's entrance

onto the land. No lands could be sold for less than $2.50 per acre.[122]

Sections Five through Eight of the Act authorized the Secretary of the Interior to award allotments in severalty to the Omahas as follows: "To each head of a family, one quarter section; to each single person over eighteen years of age, one eighth of a section; to each orphan child under eighteen years of age, one eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section." Those Omahas who previously were assigned allotments and received certificates under previous treaties or acts were given the opportunity to select the same tract for which they earlier had had been given a "certificate." The Omahas would receive patents to their new allotments, but the lands would be held in trust by the federal government for twenty five years. After individual Omahas received their allotments, all remaining reservation land east of the Sioux City and Nebraska Railroad would be patented to the Omaha tribe and also held in trust by the federal government for twenty five years, to be used as future allotments for Omaha children who might be born during the twenty five year trust period.[123]

The land sales and allotment act of 1882 was designed to please three constituencies. Settlers hoping to own lands within the western end of the Omaha reservation now had access to approximately 45,000 acres of some of the best farmland in Nebraska. Eastern reformers such as Alice Fletcher could now proceed with the allotment process as part of a

continued and ill-fated experiment to transform the Omahas and other Native Americans into small yeomen farmers; and a minority of relatively acculturated progressive Omahas believed that the acquisition of legal titles to allotted lands on the reservation would prevent their removal to Indian Territory. But most rank-and-file Omahas either opposed or were wary of the legislation and remained uncertain about their future.[124]

The language incorporated into the 1882 Act illustrates that Congressional intent was not to diminish the Omaha reservation. The sale of reservation lands west of the Sioux City and Nebraska Railroad reflected the government's decision to allow non-Indians to settle on the Omaha Reservation; it did not reflect an intent by Congress to diminish the reservation nor alter its boundaries. Unlike the transfer of lands to the United States in 1865 in which the Omahas specifically agreed to "cede, sell, and convey **to the United States** a tract of land from the north side of their present reservation,"[125] and the subsequent sale of lands in 1874 in which the Omahas agreed to "sell and convey **to the United States in trust for the Winnebago tribe of Indians,** all the right, title and interest of the Omaha Indians" to the 12,350 acre tract on the northeastern corner of the Omaha reservation,[126] the 1882 Land Act followed a familiar pattern similar to the unsuccessful Act of 1872, and the Omahas' abortive attempt to sell allotments on their reservation to the Poncas one year later. In 1882, reservation lands west of the

Sioux City and Nebraska Railroad were not sold to the federal government, but were sold to individual settlers. Sections Two and Three of the 1882 Act stipulated that although the lands were to be sold through the public land office at Neligh, Nebraska, the government would collect the proceeds of these individual sales for the Omaha tribe. As they accumulated, the funds from the sale of these lands were to "be placed to the credit of said Indians in the Treasury of the United States and shall bear interest . . at the rate of five per cent per annum, which income shall be annually expended for the benefit of said Indians. . . ."[127] Unlike the previous sales (1865 and 1874) of large tracts of Omaha lands, the 1882 Act provided for the piecemeal sale of small allotments on the Omaha reservation. There was no explicit language indicating a relinquishment of the title of the land for a specific sum of money. Indeed, the 1882 Land Act contained no explicit language indicating that the Omaha tribe had surrendered its right to the region to the federal government of the United States. The 1882 Land Act restored no lands to the public domain. Congress authorized federal officials to sell the small allotments for the Omaha tribe. **The Omahas did not cede their political sovereignty over the region.** The small individual tracts would be sold to individual settlers, but **the tracts would remain within the established boundaries of the Omaha reservation.**

Other sections of the 1882 Act also indicate that the region west of the railroad right of way was still

envisioned as part of the reservation. Although settlers in Nebraska were eager to gain access to the rich agricultural lands west of the Sioux City and Nebraska Railroad,[128] and the language of the Act was designed to encourage the Omahas to choose or accept allotments east of the right of way,[129] **Congress expected that some Omahas would choose allotments or purchase acreages west of the right of way and acknowledged that the region lying west of the railroad remained part of the reservation.** Section Eight of the 1882 Act specifically states that "said Indians or any part of them may, if they so shall elect, select the land which shall be allotted to them in severalty in **any part of said reservation either east or west of said right of way** mentioned in the first section of this act."[130] Obviously, since the Omahas were authorized to select allotments on lands west of the railroad, and if such land was no longer part of the reservation, Congress would have been authorizing Indians to select allotments on non-reservation lands. Such was not the case. In contrast, the Land Act of 1882 assured the Omahas that they could select land "in any part of said reservation either east or west of said right of way".[131] **Congress continued to envision the lands lying west of the Sioux City and Nebraska Railroad as part of the Omaha Reservation.**

In summary, the Land Act of 1882 contained no explicit language indicating the total surrender of all tribal rights to the region west of the railroad right of

way. It contained no explicit language indicating a relinquishment of title to the lands for a specific sum of money. It restored no lands to the public domain. The Act contained no indication that the Omaha people would not have access to the region. Indeed, it specifically stated in the final sentences of Section eight of the Act that the Omahas were authorized to select allotments within the region west of the railroad. And finally, the Land Act of 1882 did not specifically state what would happen to those individual acreages within the region which were not sold. **The Land Act of 1882 did not diminish the Omaha Indian Reservation.**

SUBSEQUENT LEGISLATION AND COMMENTARY REGARDING THE LAND ACT OF 1882

Subsequent federal legislation supports non-diminishment. Legislation which enabled individual settlers to postpone paying for lands west of the railroad also reflected the assumption by members of Congress that the region still remained part of the Omaha reservation. In August 1886, over two years after settlers had moved onto the western end of the reservation, Congress passed an act permitting "all persons **who have settled or shall settle *upon* said Omaha lands**" to postpone making "the first payment as therein required two years from the date of passage of this act. . . ."[132] Two years later, in 1888, correspondence between the Department of the Interior and the President of the Senate Pro Tempore regarding land west of the railroad was published

under the heading "In response to Senate resolutions of January 31 1888, information relative to **sale of lands *in* the Omaha Reservation**," and contained letters which inquired about the "**amount of lands *on* the Omaha Reservation** which have been sold pursuant to the statute approved August 7, 1882."[133] On May 15, 1888, Congress passed another extension of "the time of payment of the purchase money due for **lands sold *on* (the) Omaha Indian Reservation** . . . approved August seventh, eighteen hundred and eighty-two. . . ."[134] One year later, on August 31, 1889, Acting Secretary of the Interior Zachariah Chandler informed the Commissioner of the General Land Office that he would provide him with lists of lands west of the railroad. Chandler refers to these lands as still belonging to the Omahas.[135]

Subsequent federal statutes, Congressional reports, and agency records also support non-diminishment. Official correspondence and other federal documents throughout the 1890's continued to reflect the assumption that the lands west of the railroad were part of the Omaha reservation. During 1890, Congress again extended "the time of payments of the purchase money due for land **sold *on* the Omaha Indian reservation** under the sales made by virtue" of the act of 1882 and provided that "any entryman who has taken less than one hundred and sixty acres of ***land on this reservation*** and has made payment of same according to the law, may purchase at the appraised price, and upon the conditions prescribed in the act of August seventh,

eighteen hundred and eighty-two, such additional lands lying contiguous to lands included in his original entry as he may desire."[136]

Congressional reports focusing upon this extension also refer to the land as being **"*on* the Omaha Indian Reservation"** or individual buying lands west of the railroad as **"purchasers of land *of* the Omaha tribe."**[137] In 1894, Congress again extended the payments period for those settlers who had purchased land **"*on* the Omaha Indian Reservation"** and tacitly acknowledged that the Omahas retained an interest in these lands by adding a provision that **"this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained. . . .**[138] Although the Commissioner of Indian Affairs initially argued that such permission was not needed, white settlers on reservation lands west of the railroad also acknowledged that the Omahas retained an interest in the region and requested that the Omahas acquiesce in the renewal. Federal officials agreed to the request and on December 23, 1895, **the Omahas met in council with Indian Agent William Beck and gave their permission** for payment schedules for reservation lands west of the railroad to be extended.[139]

Five years later, in 1900, Secretary of Interior Ethan Allen Hitchcock reiterated a similar perspective. Relying upon advice from the U. S. Attorney General's Office, he ruled that settlers who had purchased land west of the railroad right-of-way were

not subject to homestead legislation since they were settled on lands **"*in* the Omaha reservation."**[140]

Obviously, the language incorporated by Congress in correspondence and legislation focusing upon the extension of the payment period for lands west of the railroad indicates that Congress continued to envision this region as part of the Omaha Indian Reservation. **Congressional intent in the Land Act of 1882 was *not* to diminish the reservation.**

Correspondence from some Indian agents in Nebraska contain contradictory statements regarding the western border of the Omaha reservation, but the bulk of evidence points to a belief that the reservation was not diminished. In 1885, the Commissioner of Indian Affairs reported that **"Omaha Reservation lands** lying west of the Sioux City and Nebraska Railroad" had recently been sold to settlers, but that many of the latter had failed to pay for the acreages.[141] Within the same report, George Wilkinson, the newly arrived federal Indian agent to the Omahas, proclaimed that the Omahas had "reduced their reservation by selling 50,000 acres west of the Sioux City and Omaha Railroad to actual settlers," but he then contradicted himself in the same letter, adding that the reservation continued to extend twenty five miles west of the Missouri River, an area that still would include the lands west of the railroad.[142]

Presbyterian missionaries shared in Wilkinson's assumption that the Omaha reservation included the lands west of the railroad. In January 1885, missionary

John Copley informed his superior, Dr. John Lowie, that "the west end of the reserve extends eight or nine miles west of Bancroft," a region obviously encompassing the lands west of the railroad, while William Hamilton, another Presbyterian minister, reported in 1887 that the Sioux City and Omaha Railroad ran "through" the reservation.[143] Such assumptions continued well into the following decade. In 1897, Indian Agent W.A. Mercer again described the Omaha Reservation as stretching thirty miles west of the Missouri and "embracing one of the finest tracts of agricultural and grazing land in the State," while two years later, in 1899, Agent Charles P. Mathewson also described the Omaha reservation as extending thirty miles west from the Missouri River and containing "about 140, 000 acres," an acreage report which obviously included the lands west of the railroad.[144]

In summary, the language contained in subsequent legislation modifying the terms of the Land Act of 1882, descriptions of the region west of the railroad right of way, and correspondence regarding this region originating from Indian agents and missionaries strongly support the interpretation that the Omaha Reservation was not diminished by the Land Act of 1882.

CONFUSION OVER FEDERAL STATISTICS

Official statistical reports from the BIA during the 1870's are confused and contradictory and reflect considerable uncertainty on the part of federal statisticians in regard to the size of the Omaha Reservation. In 1871, the Office of Indian Affairs reported that the Omaha Reservation included 345,000 acres.[145] Four years later (1875), the Omaha Indian Agent stated that the reservation contained 193,000 acres, including 50,000 acres which was offered for sale through the Act of 1872, but which had not sold.[146] As pointed out on pages 21-23 above however, these 50,000 acres which remained unsold continued to be described by federal officials as **"within the Omaha Reservation"** or as **"the western part of the Omaha reservation."**[147] **Obviously, federal officials still envisioned the approximate 193,000 acres as part of the Omaha Reservation.**

To add to the confusion, in 1881, prior to the passage of the Land Act of 1882, the ANNUAL REPORT FOR THE COMMISSIONER OF INDIAN AFFAIRS listed the Omaha Reservation as encompassing 143,225 acres, all of which had been surveyed.[148] Settlers began to occupy reservation lands west of the railroad in April, 1884,[149] but statistical reports from the Commissioner of Indian Affairs continued to list the acreage on the reservation as approximately 142,000 to 143,000 acres for the next five years, until 1888, when reservation acreage was listed as 65,191 unallotted acres, with a footnote that the "residue" or remaining portion of the reservation

contained 77,153.93 acres.[150] Obviously, the total of allotted and unallotted lands on the reservation remained 142,344.93 acres, a figure similar to the estimate of acreage on the reservation prior to the Act of 1882. Although the number of allotted acres increased and the number of unallotted acres gradually declined, statistical tables contained within the ANNUAL REPORTS OF THE COMMISSIONER OF INDIAN AFFAIRS continued to list the total acreage on the Omaha reservation as approximately 142,350 acres through the 1890's and into the early twentieth century. Acreage figures for the Omaha reservation during the final quarter of the nineteenth century are, at best, confusing, but federal statisticians seem to indicate that **the Omaha reservation did not shrink after the Act of 1882. According to the BIA, the total acreage on the Omaha Indian reservation remained essentially the same.**[151]

THE ALLOTMENT PROCESS

Since Alice Fletcher had so vigorously championed allotment as a panacea for all the Omahas' problems, federal officials appointed her as "special agent" to assist the Omahas in selecting their allotments.[152] Convinced that the Omahas should select lands in the fertile Logan Creek region, adjacent to the railroad, Fletcher established her allotment camp just east of the stream. Assisted by Francis La Flesche, a son of Joseph La Flesche and a prominent spokesperson for the progressive faction, Fletcher recorded the first Omaha allotments in May, 1883,

and continued until July when she was drenched in a thunderstorm, became ill, and was carried first to the Presbyterian Mission, then on to the agency headquarters at Winnebago. She remained convalescent through the end of the year, but continued to assign allotments from a makeshift office adjoining her sickbed at the agency. When many Omahas refused to cooperate, Indian Agent George Wilkinson ordered agency police to bring these more traditional tribespeople to Fletcher's office where they were forced to accept allotments.[153]

Most Omahas opposed the provisions of the 1882 Act. Missionaries who interacted with the tribe on a daily basis commented that the majority of Omahas wished to keep their reservation and Omaha traditionalists complained that too much land "***on*** the western part of the reserve" had been sold to white men.[154] And even Alice Fletcher, the agent who essentially forced allotment on the majority of the Omaha people, envisioned the region west of the railroad as still part of the reservation. As Joan Mark, Fletcher's foremost biographer, points out, Fletcher initially urged the Omahas to select allotments west of the right of way, and fifteen members of the progressive faction (including several relatives of Francis La Flesche, Fletcher's assistant) chose allotments which were located (either totally, or in part) west of the railroad. Several of these allotments were bisected by the right of way, but the total acreage in Omaha allotments lying west of the Sioux City and Nebraska Railroad was approximately *935* acres.[155]

Yet Fletcher was unable to persuade other Omahas to select allotments west of the right of way. Although they considered the region to be part of the reservation, they were reluctant to settle in a region in which they regularly had hunted, but had not previously established villages. Most Omahas preferred to reside east of the railroad where they could maintain traditional ties and a sense of community among relatives and friends. Eventually, Fletcher convinced 326 Omahas (about one-fourth of the tribe) whom Fletcher described as "many of the most progressive families" to accept allotments in the four townships near the right of way, but most Omahas wished to "keep their reserve" and "live as Indians."[156] In 1884, less than two years after the Land Act of 1882 had passed Congress, Fletcher admitted that only one third of the Omahas had supported the Act and the allotment process.[157]

Additional allotments were assigned following the passage of the Dawes Act in 1887. In 1893, Congress amended the 1882 allotment Act and provided eighty acres of land to the wives of adult males who received allotments in 1882. The amendment also stipulated that Omaha children born between 1882 and 1893 would receive eighty acres rather than the forty acres provided in the 1882 Act, and in accordance with the general provisions of the Dawes Act, any other Omaha allottee who received only forty acres following the 1882 Act would receive an additional forty acres. All of the new allotments were to

come from land held jointly by the tribe. These allotments finally were made in 1900.[158]

Following the allotments of 1900, approximately 4500 acres of unallotted lands remained on the Omaha Reservation, and in 1909, the BIA decided to sell these lands and divide the proceeds among the five hundred and twenty living Omaha children who had been born since the 1893 allotment. In 1912, Congress provided for the sale of these lands, but first small acreages were reserved for the Presbyterian Mission, the Nebraska Historical Society, and additional Omaha cemeteries.[159] Additional tracts also were set aside for a handful of Omaha tribespeople whose original allotments had already been severely eroded by the Missouri River. Those Omahas eligible for new allotments due to erosion quarreled among themselves and neither the assignment of the new allotments, nor the sale of the surplus unallotted lands were finalized until 1916, but the lands eventually were sold and the Omaha children finally received their share of the proceeds. The per capita payment to each eligible Omaha child was less than $250.00.[160]

OMAHA RESIDENCY AND UTILIZATION OF RESERVATION LANDS WEST OF THE RAILROAD RIGHT OF WAY

As indicated in the previous section, some Omahas selected allotments west of the railroad. Yet the Indian Department intervened to keep those

numbers small. After extensive debate in the Senate, which focused primarily on the right of Omahas to purchase lands west of the railroad, the bill (S No. 1255) eventually was passed on to the House where it was amended to allow any Omaha to select his or her amendment "in any part of said reservation either east or west of the said right of way."[161] Senator Saunders of Nebraska immediately objected to the amendment and asked that the bill be sent to a joint committee of the Senate and the House. The bill was then referred to a joint committee of both houses on which Senator Saunders served, along with Congressman Dudley Haskell of Kansas.[162]

Saunders and Haskell had both conferred closely with Commissioner of Indian Affairs Hiram Price in designing the initial bill that previously had been introduced into the Senate and Saunders, Haskell, and Nebraska Congressman Edward Valentine, who worked hand in hand with Haskell to steer the bill through the House, all were eager to open the lands west of the railroad to non-Indian settlement. In contrast, Price (described as a "consistent reformer" who viewed allotment as "a means of transforming the Indian,")[163] and Alice Fletcher had relatively little interest in the sale of lands west of the railroad, but they were determined to force allotment on the Omahas. Obviously, both of these parties (Saunders, Haskell, and Valentine on one side – Price and Fletcher on the other) were eager for this bill to be passed and implemented, but for different reasons (mentioned above), and neither wanted the passage of

the bill jeopardized. In consequence, the bill that finally passed guaranteed that reservation lands west of the railroad would be open to non-Indian settlers, and that the Omahas would be forced to take allotments.

At first glance, the Land Act of 1882 seems to indicate that Saunders, Haskell, and Valentine were the losers in this process: they had been forced to acquiesce to the demands by a majority in Congress that the Omahas would be allowed to select allotments and purchase lands west of the railroad. Obviously, such continued access to these lands by the Omahas potentially would diminish the acreage in that region that could be sold to settlers. Meanwhile, Price and Fletcher seemed to achieve all their aims, since a bill had passed Congress which assured that the Omaha reservation would be allotted.

Why did Saunders, Haskell, Valentine, and their supporters agree to the bill? The key to this unholy alliance can be found in Price and the Indian Department. Although the legislative history of this Act clearly indicates that Congress intended that the Omahas should have access to lands west of the railroad, it was Price (and Fletcher, as Price's allotting agent) who exercised considerable influence over just where the Omaha allotments would be chosen or assigned. An examination of the correspondence between Price and Fletcher indicates that Price exerted considerable pressure upon Fletcher to use her influence to keep the Omahas from selecting allotments west of the railroad. To give Price his due,

he did not specifically order Fletcher to forbid the Omahas from selecting allotments west of the right of way (since such instructions would have directly violated the provisions in Section 8 of the 1882 Land Act), but the tenor of his correspondence with the allotting agent indicates that he wanted Fletcher to discourage the Omahas from taking allotments in that region. For her part, Fletcher later admitted that she had no qualms about forcing the Omahas to take allotments where she thought best. According to Fletcher, "The work must be done for them, whether they approve or not."[164]

Price instructed Fletcher to inform the Omahas that if they did select allotments west of the right of way, they would have to do so immediately, and afterward they would never be able to exchange them for any other allotment on the east side of the railroad. According to Price:

> As heretofore instructed you will ascertain whether any of the Indians desire to make selections west of the railroad, and if there are any who do, they must be required to make them at *once*. There must be no dilly-dallying on their part and they will be given to understand that if they once make a selection **west** of the railroad they cannot afterward give it up and take another allotment elsewhere, either east or west of the railroad. When they have once made a selection it must be final.[165]

Price defended his instructions by stating that he was afraid that if Omaha allottees took allotments west of the railroad they would be vulnerable to land speculators, and they might lose their allotments,[166] but he gave no rationale why Omaha allotments west of the right of way would be more vulnerable than those to the east of the railroad, except that the lands west of the right of way were "tracts of extra value."[167]

These "tracts of extra value" also were of particular interests to Saunders, Valentine, Haskell and other politicians who wanted to see the region opened to white settlement. Price was appointed Commissioner of Indian Affairs in 1881, only one year prior to the passage of the Land Act of 1882. Prior to that time he served for two terms in the House (from Iowa) where he became well acquainted with Haskell and Valentine.[168] Indeed, as Commissioner of Indian Affairs, he assisted Haskell in composing the original draft of the bill, and his efforts had focused on the allotment provisions.[169] When the amended bill was returned to the Senate and Saunders initially threatened to block its passage, Price must have been alarmed. Yet after the bill went to the joint committee, Saunders quickly dropped his objections, and the Senate passed the bill with its amendments. Of course the Land Act of 1882, as passed, allowed the Omahas to select allotments west of the railroad, but these allotments were to be made through an allotment agent (Fletcher) assigned and employed by Price. Saunders' abrupt reversal on the bill's passage and the subsequent correspondence between Price

and Fletcher suggest that Price (and probably Haskell) intervened and assured Saunders that, although the 1882 Land Act stated the Omahas might select allotments west of the railroad, the Indian Office would use its influence to prevent them from doing so.

Price's efforts in dismantling Congressional intent in regard to the Omahas' right to **purchase** individual acreages west of the railroad right of way was far less subtle. Although considerable debate in the Senate focused upon this issue,[170] and members of Congress (including Senator Saunders)[171] specifically agreed that individual Omahas could purchase acreages ("It is understood that an Indian has the right to purchase the same as a white man, in regard to the land")[172] west of the railroad, in 1884 Price explicitly intervened and decreed that they should be forbidden to do so. According to Price, the only people eligible to purchase reservation lands west of the railroad were American citizens or "foreigners subject to another allegiance."[173] Omahas were not American citizens. Although Congress had intended otherwise, reservation lands west of the railroad would be sold only to white men.

In retrospect, Price's efforts did much to negate the Congressional intent manifested in the legislative history of the Land Act of 1882. Whether Saunders was informed of Price's intentions while the Joint Committee of the Senate and House met to discuss this Act in the three days between July 29 and August 3, 1882 remains unknown, but something

happened which evidently reassured Saunders that significant numbers of individual Omahas would either be discouraged from selecting allotments west of the railroad, or forbidden from purchasing lands in that region, for Saunders completely reversed his earlier opposition to the amended bill, and the Land Act of 1882 (as amended) passed both houses of Congress. Evidence strongly suggests that either Price, or someone speaking on Price's behalf (Haskell?) assured Saunders that regardless of Congress's intent, the Indian Department would use all their influence to prevent the Omahas from selecting allotments or purchasing lands west of the railroad.

Yet Price's efforts were not totally successful. As indicated on page 58 above, fifteen Omahas selected allotments either totally or partially west of the Sioux City and Nebraska Railroad right-of-way. Many of these allotments were selected near Bancroft, in modern Cuming County.

More important, however, was the role that Omaha people played in the early history of Pender and Thurston County. Many Omahas regularly visited Pender, resided in the village, and conducted business there. Excerpts from the correspondence and diary of Rosalie Farley, whose allotments were located west of the railroad, indicate that her family resided on her allotment, and that she and other Omahas regularly visited Pender, conducted business at that location and even attended concerts in the village.[174] Between 1890 and 1895 Thomas Sloan, an attorney and member of the Omaha tribe, maintained

both a residence and a law office in Pender where he employed Omahas as clerical assistants and evidently met with both Omaha and non-Indian clients.[175] Hiram Chase, another attorney and enrolled member of the Omaha tribe, also resided and practiced law in Pender, where his children attended public schools.[176] Moreover, Sloan, Chase, and other members of the Omaha tribe actively participated in Thurston County politics. The good citizens of Pender and Thurston County obviously were familiar with Sloan, Chase, and other Omahas, because they repeatedly elected them to public office. **Omaha tribal member Thomas Sloan was elected mayor of Pender.** He also was Thurston County Surveyor, and Justice of the Peace; while **Hiram Chase served as Thurston County Attorney for eight years, before being elected as County Judge.** By 1905, Simeon Hallowell, another member of the Omaha tribe, also had served as a Justice of the Peace, a Thurston County Assessor, and a member of the local school board.[177]

Pressure by the Indian Department and arbitrary decisions by Hiram Price did much to thwart the will of Congress and either discouraged or prevented many Omahas from moving into the region west of the railroad, but in the decades following the passage of the 1882 Land Act, **Omaha tribal members continued to utilize reservation lands west of the right of way.** They farmed, grazed cattle, resided, and conducted business in this region. **Moreover, they maintained both homes and businesses in Pender, and played a major role**

in the economic and political development of both the village and Thurston County. The Omahas still considered the lands west of the railroad to be part of their reservation.

CHAOS IN THURSTON COUNTY

In the aftermath of the 1882 Land Act, conditions deteriorated on the Omaha Reservation. Section Seven of the act stipulated that "every member of said tribe (the Omahas) shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska," but state officials were either unwilling or unable to provide basic services and surrounding counties discouraged their officers from entering the reservation to enforce laws or arrest troublemakers.[178] In response, Omaha tribal leaders attempted to establish a new tribal government to oversee the reservation, and in 1884 the federal government dismissed all agency employees who provided services to the Omahas except for the agency farmer and teachers associated with the government school. All agency buildings also were turned over to the tribe, and in 1885, even the agency farmer resigned, but the Omahas had no experience administering local government, and conditions on the reservation rapidly deteriorated. By the early 1890's, the former agency buildings were in shambles, many reservation roads were in disrepair, illegal alcohol was readily available, and law enforcement was almost non-existent. Many traditional Omahas complained that they had neither wanted nor asked

to be citizens of Nebraska, and even Alice Fletcher admitted that the Omaha "experiment" had been a failure.[179]

The Omahas contributed to the problem. Clearly they wished to retain their reservation, but tribal members quarreled among themselves over how it should be administered. They also argued over the leasing of tribal lands and the nature of the tribe's relationship with both the federal government and local non-Indians.[180] The leasing of both allotments and tribally held land proved to be a particularly contentious issue. Although the 1882 Land Act originally forbade the Omahas to lease their allotments, many did so and federal agents seemed powerless to stop this practice. Ignoring the law, white businessmen from Pender, Homer, and other nearby communities (sometimes in collusion with local Indian agents) took advantage of many Omahas' naivete' in regard to the potential value of agricultural or grazing lands on their allotments. Eager to turn a profit, the businessmen illegally leased Omaha allotments for a pittance, then re-leased these lands to non-Indian farmers or ranchers at considerably higher rates. These middlemen pocketed handsome profits from these transactions while sometimes even refusing to reimburse the Omaha allottees for the initial lease payment.[181]

The leasing of tribally owned land also contributed to the intra-tribal strife. In 1884, following the initial allotment of reservation lands to individual Omahas, thousands of acres of tribal lands lying east

of the Sioux City and Omaha Railroad right-of-way still remained unallotted. Some Omahas who leased their allotted lands to non-Indians grazed cattle on these tribal lands, but much of it was incorporated into a tract known as the "Big Pasture" and managed by Edward and Rosalie Farley. Edward Farley was born in Indiana and was of Irish descent, but in 1880 he had married Rosalie La Flesche, the daughter of Joseph La Flesche, and he was accepted by many Omahas as "one of us and we trust him."[182] In July 1884, the Farleys applied, through Indian Agent George Wilkinson, for a twenty year lease on approximately 18,000 acres of unallotted Omaha land in the Logan Creek Valley. They then fenced this acreage and leased out grazing rights to both white and Indian ranchers, sharing the proceeds with the Omaha tribe.[183] Meanwhile other ranchers and "land companies" grazed cattle illegally on the reservation, over-running both tribal lands and individual allotments. Some Omahas cooperated with the "Pender Ring," a syndicate of local businessmen led by William Peebles, who attempted to wrestle control of the Big Pasture from the Farleys. Most Omahas supported the Farleys, but the confrontation led to armed encounters, legal actions, and a questionable Congressional investigation of leasing and allotment on the Omaha reservation that only added to the confusion.[184]

If non-Indians in Pender and adjoining regions were eager to lease Omaha lands, their interest in the Omaha Reservation only increased after Thurston

County was organized in March, 1889. Since the Omaha and Winnebago reservations encompassed "the entire Thurston County area,"[185] the reservations represented a cornucopia of potentially valuable farm and grazing land which non-Indians hoped to target for both purchase and/or taxation. Both the Land Act of 1882 and the Act of 1893 contained provisions stating that the federal government would hold individual Omaha allotments assigned under these acts in trust for twenty-five years following the assignment of these allotments. The allotments could not be sold by the allottees, nor taxed by state and local governments until the twenty-five year trust period expired. Consequently, the allotments assigned under the 1882 Act (actually assigned in 1884) and those assigned under the 1890 Act (actually assigned in 1893) could theoretically not be sold by individual Omahas until 1909 or 1915, respectively.[186]

Non-Indians living in Pender and other regions of Thurston County were eager to purchase good farmland held by individual Omahas and to tax any allotments that the Omahas retained. In 1902, the Indian Appropriation Act permitted adult heirs of deceased Indians whose land originally was held in trust to sell those "heirship lands" after the original allottee died. The sale of such lands supposedly would be supervised by local Indian agents to assure that the Omahas or other Indians would receive a fair price for these inherited acreages. Heirship lands inherited by minors could not be sold without a court order. The Omaha tribal council protested the sale of

these lands, but their protests were ignored.[187] The initial sale of these lands on the Omaha Reservation was so fraught with fraud that Secretary of the Interior Ethan Hitchcock nullified many of the sales and ordered an investigation of Omaha Indian Agent Charles Mathewson, who obviously cooperated with land speculators in this process. In 1903, Mathewson was forced to resign and more stringent controls were placed over the sale of heirship lands, but most of these reservation acreages still passed into the hands of speculators or non-Indian farmers. In addition, funds received from the sale of these lands and deposited in tribespeople's bank accounts would later become the focus of Thurston County officials eager to target Omahas for taxation.[188]

The Burke Act, passed by Congress in 1906, also facilitated the transfer of allotments on the reservation from Omaha to non-Indian possession. The Burke Act allowed the President or the Secretary of the Interior to declare individual Indian allottees "competent" before their twenty-five year trust period had expired. "Competent" Omahas (and other Indians) would then be given their allotted lands in fee simple, and such lands would be subject to local taxation. By 1908 one hundred and twenty-three Omahas were declared competent under the provision of this legislation and about 6900 acres of reservation land had been awarded to these allottees in fee simple.[189] But other Omahas claimed they personally lacked the acumen or education to manage their allotments in fee simple and petitioned the government to prolong

their trust relationship. Although some Omahas (i.e., Hiram Chase) who signed this petition obviously were competent to handle their own private affairs, many were not.[190] As the July 10, 1909 expiration date for the 1882 allotments neared, the reservation was overrun by land speculators, and Indian agents warned that many Omahas soon would fall victim to "grafters and land grabbers." The PENDER TIMES boasted that "all the desirable farm land, as good as the best in northeastern Nebraska, will fall into the hands of whites who have awaited the move;" meanwhile, Thurston County officials eagerly anticipated the opportunity to tax the Omaha allotments.[191]

Yet officials in the BIA were afraid that if most Omahas received their lands in fee simple they would lose them to speculators, so on July 3, 1909, just one week before the trust period for the original 1882 Land Act allotments was due to expire, President William Howard Taft extended the trust period for almost all of these allotments for an additional ten years, until 1919. Since many of the land speculators already had bribed individual Omahas in an attempt to insure that they would have access to Omaha allotments after the trust period ended, these speculators lost their money and they were infuriated. Moreover, Thurston County officials also were incensed since they had anticipated that after July 10, 1909 the Omaha allotments no longer would be held in trust and would be subject to local taxation.[192]

To assuage county officials, BIA officials established a "competency commission" to interview or

examine individual Omahas to determine if they were competent to manage their allotments. If the commission declared the tribesperson competent, the Omaha was to be given his/her allotment in fee simple. Following the issuance of these fee patents, the land awarded to "competent" Omahas would be eligible for taxation.[193]

Utilizing methodology which historian Judith Boughter describes as both "arbitrary and unfair," between October 10, 1909 and February 1, 1910, a competency commission comprised of two officials from the BIA, and H. P. Marble, a Pender newspaper editor "supposedly questioned 605 Omaha allottees."[194] Almost all historians who have examined this process agree that the competency commission proceedings were fraught with fraud and chicanery. The commissioners ruled some Omahas competent who could not read, write, nor even speak English. Other Omahas whom the commissioner never interviewed also were included on the competent list. At least fifty Omahas whom the commission did interview specifically stated that they did not want their lands in fee simple, but the commissioners also declared them competent and forced them to accept patents. In March, 1910 federal officials declared 294 Omahas "competent."[195]

Lists of the competent Omahas names and descriptions of their allotments were then published in THE PENDER TIMES and WINNEBAGO CHIEFTAIN, and the great land rush was on. Although it was illegal for these Omahas to contract for the sale

of their land prior to receiving the tracts, many Omahas did not understand these restrictions and land speculators were eager to gain access to these acreages. Within three days, fifty tracts were sold and the transactions registered at the Thurston County courthouse in Pender. Other Omahas, unable to read or write English, were tricked into signing deeds for their lands in exchange for small debts that they owed to local merchants. Within two years (1912), over ninety percent of the Omahas who had been designated as "competent" by the commission had lost their lands; eight percent had mortgaged their acreages; and only two percent retained their lands free from any encumbrance.[196]

Although officials admitted that the results of the 1910 competency commission "was not a success," and Robert Valentine, the Commissioner of Indian Affairs who championed such commissions subsequently resigned, his successor Cato Sells continued the program.[197] In 1915, against the recommendation of Omaha Indian Superintendent, Axel Johnson and two special inspectors who had investigated the impact of the 1910 competency commission on the Omaha tribe and reservation, Sells and Secretary of the Interior Franklin Lane renewed the competency commission program and the Omaha land loss continued. By 1916, nearly ninety percent of all Omaha allottees holding fee-patents had either sold their lands or mortgaged them so heavily that they had little chance of ever reclaiming them. The private ownership of

lands on the Omaha reservation continued to pass from Omaha hands.[198]

While Omaha patents passed out of Omaha hands, reservation lands that remained in the possession of individual Indians or the tribe were subjected to increased taxation. In 1893, George Meiklejohn, a Congressman from Nebraska's Third Congressional District, unsuccessfully introduced a bill into Congress that would have allowed taxes on Omaha lands to be deducted from tribal trust funds. The bill failed to pass, but in 1905, Thurston County officials attempted to tax any funds from the sale of heirship lands received by individual Omahas and deposited in local banks or other financial institutions. U.S. District Judge W.H. Munger upheld the county's actions, but in 1906, the federal government appealed the case and the U.S. Court of Appeals (in *United States v. Thurston County*) overturned Munger's decision.[199] Still determined to get their hands on Omaha funds, county officials then utilized a federal bill providing for the drainage of the Logan Creek region to assess up to $240.00 from any Omaha whose allotment lay within that watershed. Legislation passed in 1916 enabled Thurston County to assess additional taxes for drainage ditch construction, and also permitted county officials to issue a lien on Omaha allotments if such taxes were not paid.[200] Thurston County's assault upon Omaha resources obviously continued.

In 1910, the Omahas' tax burdens increased. On May 6, 1910 Senator Norris Brown of Nebraska

pushed a bill through Congress that subjected all Omaha lands allotted before 1885 to "appraisement and assessment for the purposes of taxation and subject to taxation for local, school district, road district, county, and state purposes as provided by the laws of the State of Nebraska."[201] The act stipulated that if taxes on such lands remained unpaid one year after they were due, the Thurston County Treasurer would report delinquencies to the Secretary of the Interior, who was then authorized to pay such taxes from rent money on deposit in the accounts of individual Omahas whose lands were still held in trust status. If no funds were available, the taxes would be excused. In addition, lands subjected to the Act could not be sold for unpaid taxes.[202] Ironically, the Brown Act encouraged all "competent" Omahas to withdraw their savings from banks while "incompetent" Omahas whose bank accounts were subject to federal control now bore the brunt of the new legislation. The Brown Act also essentially reversed the 1906 decision in *United States v. Thurston County*, which protected Omaha bank deposits from seizure by county officials; moreover it seemed to conflict with the Enabling Act of 1864, which admitted Nebraska to statehood, and which forbade the State of Nebraska from imposing taxes on lands or property in the state belonging to or purchased by the federal government.[203]

Six years later (December, 1916) the Brown-Stephens Act, steered through Congress by Senator Brown and Nebraska Congressman Daniel Stephens, extended the taxation provisions of the 1910 Brown

Act to Omaha allotments issued in 1885 and later. Although the federal government did provide the Omaha tribe with an extension of the federal trust period over its lands in 1919, the extension had little impact. Due to the provisions of the Brown Act and the Brown-Stephens Act, almost all Omaha lands already were subject to taxation because of such "special legislation."[204]

In retrospect, the half-century following the 1882 Land Act was disastrous for Omaha tribal members in Nebraska. In addition to opening up reservation lands west of the railroad to white settlement, and the allotment of reservation lands to individual Omahas in 1882 and 1893, the government failed to provide adequate safeguards to protect these allotments from non-Indians. The removal of trust restrictions under the Burke Act and subsequent competency commissions, coupled with the aggressive taxation policies of Thurston County and the State of Nebraska embodied in the Brown and Brown-Stephens Acts, facilitated the transfer of most reservation lands into non-Indian possession. Tragically, some Omahas and Indians agents colluded in this process, but most of the loss originated from ill-conceived federal Indian policies and from the desire of non-Indians in Thurston County and surrounding regions to gain access to Omaha lands. As historians Judith Boughter, Janet McDonnell, Mark Scherer, Richmond Clow, David Wishart, In'aska, (Dennis Hastings) and Margery Coffey (Mi'onbathin) all have illustrated, the reservation persisted, but Omaha

ownership of lands on the reservation continued to decline; by 1955, only about 28,000 acres on the reservation remained in Omaha possession.[205]

MAPS

With a few exceptions, maps focusing upon the Omaha Indian Reservation and Thurston County include the region west of the Sioux City and Nebraska Railroad as part of the reservation. Prior to the 1882 Land Act, commercial cartographers depicted the boundaries of the reservation as those described in the 1855 land survey. These map-makers often failed to differentiate between the Omaha and Winnebago reservations and still included the lands on both reservations simply as the "Omaha Reservation,"[206] but following the 1882 Land Act leading commercial cartographers such as the ENCYCLOPEDIA BRITANNICA, or Rand McNally consistently included the lands west of the railroad as part of the Omaha Reservation.[207]

The "Official State Map" ("road map") of the State of Nebraska, produced on an annual or biennial basis by the Nebraska Department of Roads and distributed free to the general public reflects the State of Nebraska's official position regarding the reservation lands west of the Sioux City and Nebraska Railroad. A survey of state highway maps in the archives of the Nebraska Department of Roads in Lincoln indicates that the archives possess Nebraska highway maps dating from 1949. Between 1949 and

1972, these official maps of the State of Nebraska completely ignored the Omaha Indian Reservation. There were no features on the map to indicate that any part of either the Omaha or Winnebago reservations existed.[208] In 1972, however, the official map changed. Maps published in 1972 indicated that the Omaha Reservation, including the lands west of the railroad, encompassed the southern half of Thurston, and parts of Burt and Cuming counties. Indeed, the 1972 map illustrated that the western and southern borders of the Omaha Reservation followed the reservation boundary lines established by surveyors in 1867.[209]

The Nebraska Department of Roads continued to publish and distribute maps showing the Omaha Indian Reservation as encompassing all the lands west of the railroad until 1975, when the map was altered to indicate that the southwestern boundary of the reservation then (in 1975) would be State Highway 16, northwestward from Bancroft to the junction of Highway 16 and State Highway 9, about two miles south of Pender. The 1975 map indicated that the reservation border then extended due west from this junction to the original western boundary of the Omaha Reservation, which also serves as the western border of Thurston County. Although this new portrayal of the Omaha Reservation incorrectly depicted some lands lying west of the railroad in Cuming County to no longer be part of the reservation, the 1975 Nebraska State Highway map still indicated that **the city of Pender and the southwestern**

part of Thurston County lying north of the Cuming County boundary continued to be located inside the Omaha Reservation.[210]

A survey of maps in the archives of the Nebraska Department of Roads indicates that the State of Nebraska continued to include Pender and western Thurston County within the boundaries of the Omaha Indian Reservation for about the next twenty years (1975-2005?). In 2003 however, Mark Casey, the Highway Superintendent of the Thurston County Road Department contacted the Nebraska Department of Roads and requested that the state road map of Nebraska be redrawn. Casey admitted that "the latest BIA maps that are in my possession show the original boundary of the Reservation and include a notation 'Omaha Treaty Boundary of March 10, 1854;'" in other words, he acknowledged that the federal government included the lands west of the railroad as part of the reservation. But Casey requested that the boundary should be changed "particularly in the area around Pender" due to a "District Court decision of August 22, 2000, Case No. CR 00-6. . . ."[211] Although this decision was rendered in a District Court of Thurston County, not a federal court, state cartographers acquiesced to political pressure and again redrew the western borders of the reservation, creating an altered map that moved the western boundary of the Omaha Reservation to a new location just east of Pender. These cartographers then extended the reservation's western boundary to the junction of State Highways 94 and 9 (north of Pender)

and depicted State Highway 9 as the western border of the reservation until this highway passed into the Winnebago Reservation. Of course this new and arbitrary delineation of reservation boundaries placed Pender outside of the reservation's borders. Federal officials have ruled that this new boundary delineation by the State of Nebraska's cartographers is incorrect.[212]

In 2007, the State of Nebraska's Attorney General's Office cited a 1999 Thurston County criminal case, *State of Nebraska v. Damon Picotte*, in an opinion to the Nebraska Liquor Control Commission and stated that, on the one hand, Pender was not considered to be on the Omaha Reservation. On the other hand **the Attorney General's Office conceded that "the determination of reservation boundaries is a federal matter.**[213]

In contrast, the federal government considers the region west of the Sioux City and Nebraska Railroad to be part of the Omaha Reservation. On January 31, 1884, eighteen months after the passage of the 1882 Land Act, federal cartographers working for the BIA drafted a map indicating that boundaries of the reservation remained the same: lands to the west of the railroad right-of-way remained part of the reservation.[214] Detailed maps focusing upon the Omaha Indian Reservation in the first half of the twentieth century seem to be rare, but in November 1961, the Winnebago Agency issued a "Historical Summary for Omaha Reservation" which stated that boundaries of the Omaha Reservation had been delineated in the

original survey of 1855, and had been diminished **only** by the two treaties selling lands to the Winnebagos. According to the "Summary," these "two statutory cessions . . . are the only changes effected in the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them."[215]

Three years later, in October 1964, the BIA – Branch of Real Property Management, Aberdeen Office issued a map of the reservation again indicating that the western borders of the reservation remained the same as those established by the survey in 1855 and contain the note:

> The boundaries of the Omaha Indian Reservation are described in the "Field Notes in the Ancient and Misc. Surveys, No. 16, Vol. 3, and diminished by the cession of March 6, 1865 (14 Stat. 667), and the purchase by the Winnebago Tribe pursuant To the Act of June 22, 1874 (18 Stat. 146), document number 383-845.[216]

But this initial note is followed by a bracket containing "(See Note **) which contains the following statement from an unknown author:

> The land lying to the West of the line between Township 24 North, Range 7 East, and Township 24 North, Range 8 East, and West of the Sioux City and Nebraska Railroad Right-of-way (later C., St. P., M, & O. RR.) as

> it passed through Township 25 North, Range 6 East was "Opened for Settlement" by the Act of August 7, 1882, (22 Stat. 341). This Office holds the opinion that this Act of Congress has DIMINISHED the boundaries of the Omaha Reservation.[217]

Yet if the Aberdeen office of the BIA believed that the reservation boundaries had been diminished, why would they continue to depict the Omaha Reservation with its original 1855 borders? Obviously, in 1964, the "Note" added in small print by an anonymous author was an afterthought. **The boundaries portrayed on the BIA's official map were not changed.** They continued to indicate that the region west of the railroad remained part of the Omaha Reservation.

On August 3, 1994, the Aberdeen Office of the BIA issued a map which seemed to slightly alter the reservation boundaries. It depicted the reservation boundary as following the right-of-way from Bancroft, Nebraska northwestward to the modern Thurston County line, but the map indicated that the reservation extended westward along the modern Thurston-Cuming county border as far west as the original 1855 reservation boundary, then north along the modern Thurston-Wayne county border until it intersected with the Winnebago Reservation. This map, compiled in August, 1994, still placed all of western Thurston County, including the city of Pender, within the boundaries of the Omaha Indian Reservation.[218]

Since 1994, the BIA has revised its assessment of the southern and western boundaries of the Omaha

Indian Reservation and has determined that the most logical boundaries are those which were established in 1855. In 1999, the Area Director of the Aberdeen Agency, after consultation and careful research by her staff reported that "the western boundary of the Omaha Reservation is as depicted on the map entitled "OMAHA RESERVATION, as of August 08, 1996, issued by USDIA-BIA ABERDEEN AREA GIS, of March 28, 1999."[219] In 1999, the BIA produced a map that "clearly" depicted the western boundary of the Omaha Reservation as that border delineated in 1855, and that boundary was also used by the United States Department of Commerce in conducting the 2000 Census.[220] Maps compiled by the Census Bureau in 2000 reflect such reservation boundaries, and clearly place Pender within the borders of the Omaha Indian Reservation.[221]

Since 2000, Ms. Teri Lamplot, Chair of the County Board of Supervisors for Thurston County has asked the U. S. Census Bureau to again revise the boundaries of the Omaha Indian Reservation, but the Census Bureau has refused. In 2007, Robert LaMacchia, the Chief of the Geography Division of the U. S. Census Bureau informed Ms. Lamplot that the Census Bureau would continue to rely upon the BIA maps which indicate that the western boundaries of the Omaha Indian reservation were established in 1855. According to LaMacchia, "While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no

new legal opinion, federal court decision, Act of Congress, etc., has altered these boundaries."[222]

In the 21st Century, official maps of the "OMAHA RESERVATION" compiled by the BIA,[223] and "Boundary and Annexation Survey Map (s)" of the Omaha Reservation, the city of Pender, and Thurston County Nebraska, all compiled by the United States Census Bureau have continued to indicate that **Pender Nebraska, southwestern Thurston County, and those sections of the Omaha Reservation lying west of the former Sioux City and Nebraska Railroad right-of-way remain part of the Omaha Indian Reservation.**[224]

RECENT OPINIONS OF THE OFFICE OF THE SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR

In 1989, Marcia M. Kimball, an employee in the Field Solicitor's office in the U.S. Departments of the Interior's Minnesota Office issued an opinion supporting the railroad right-of-way as the western boundary of the Omaha reservation, but in the rationale supporting her discussion, she incorrectly stated that **no** "Indian trust allotments were made on lands lying **west** of the Sioux City and Nebraska Railroad right-of-way,"[225] a circumstance which the allotment map discussed on pages 58 and 64 (endnote 155) clearly illustrate to be incorrect. Proponents of the railroad as the western boundary of the Omaha Reservation have relied heavily upon Kimball's opinion, but n

April, 2012 Kimball's opinion was superseded. In a memorandum issued on April 16, 2012, Patrice H. Kunesh, Deputy Solicitor for Indian Affairs in the United States' Solicitor's Office in Washington informed Priscilla Wilfahrt, the Field Solicitor in Minnesota that Kimball's letter containing her opinion was to be "hereby withdrawn and not to be relied upon or used by your office."[226] Instead, the Department of the Interior, the Office of the Solicitor in Washington, D.C., the Field Solicitor's Office in Minnesota, and the Winnebago Agency in Nebraska have been instructed to utilize a 27 page letter written by Wilfahrt on April 24, 2008, which concludes there is insufficient evidence to conclude that the Omaha Reservation has been diminished.[227] According to Kunesh:

> I have reviewed your letter of April 24, 2008, to the Great Plains Regional Director of the BIA, which concludes that **the boundaries of the Omaha Indian Reservation have not been diminished.** The April 24, 2008 letter supersedes your Office's letter of June 27, 1989, to the Great Plains Regional Director regarding "Survey of Western Boundary of Omaha Reservation." The June 27, 1989 letter is hereby withdrawn and not to be relied upon.[228]

Obviously, according to the Solicitor Office of the Department of the Interior, the Omaha Indian Reservation includes the region west of the railroad. The reservation has not been diminished.

SUMMARY AND CONCLUSIONS

After examining extensive historical documents and secondary materials, **it is my opinion as a historian with over forty years experience in both studying and writing about the history of Native American people, that the Omaha Tribe has a valid and continued claim to its reservation in eastern Nebraska. It is also my opinion that the Omaha Reservation has not been diminished by the 1882 Land and Allotment Act, and that the Omaha Reservation continues to include the region west of the old Sioux City and Nebraska Railroad right-of-way.** My opinion is based upon the following points:

1. Eastern Nebraska has long been part of the Omaha homeland.

The Omahas arrived in the central Missouri Valley during the seventeenth century, moved to eastern Nebraska, and were the dominant Indian tribe in the region during the latter decades of the eighteenth century. They have strong emotional ties to their lands in Thurston County and have occupied this region for generations.

2. Initial treaties establishing the Omaha Reservation in Eastern Nebraska were characterized by fraud and deception.

According to John Dougherty, an American Indian Agent, the 1830 treaty signed by Omaha

leaders at Prairie du Chien was rewritten by other officials in Washington, after the Omahas signed the original document, and was altered to award exclusive use of western Iowa to the Potawatomis. After the Omahas complained, and Indians agents negotiated a new treaty, the Senate refused to ratify the new agreement. In 1854, Thomas Gatewood, the Omaha Indian Agent negotiated another treaty at Council Bluffs in which the Omahas ceded most of their lands west of the Missouri River. An Omaha delegation authorized to only "slightly modify or alter or amend"[229] this "Gatewood Treaty" was sent to Washington to finalize this agreement. Yet when they arrived in Washington the Omaha delegation learned that federal officials had rejected the Gatewood Treaty. Although the delegation had no authority to negotiate a different agreement, federal officials coerced them into signing what amounted to a new (and unauthorized) treaty in which they accepted smaller payments for the trans-Missouri lands and also agreed to the future allotment of their reservation, a condition not included in the Gatewood Treaty. Both the 1830 treaty and the 1854 treaty were not agreements negotiated by authorized Omaha delegates, but were forced upon the Omaha people by federal officials.

By the government's own admission, the Winnebago Treaty of 1865 involved outright fraud. With the exception of Joseph La Flesche, all of the Omaha delegates who signed the 1865 were illiterate and were not informed that allotment provisions had been

changed to provide most Omahas with smaller acreages. **La Flesche** was aware of these alterations, but **was bribed by Indian Agent Robert Furnas not to disclose that the 1854 treaty had been changed.** Moreover, the newer treaty provided that Omaha allottees were to be issued not deeds, but "certificates." These certificates later were deemed to be legally invalid and therefore useless.

3. The Federal government failed to honor its promises to protect the Omahas and their property.

In three treaties (Portage de Sioux, 1815; Council Bluffs, 1825; Washington, 1854) the Omahas pledged their friendship to the United States. In exchange, the federal government promised to place the Omahas "under their protection."[230] Although the Omahas kept their part of the bargain, and remained at peace with the United States and its citizens, the federal government repeatedly failed to honor its part of the agreement. Sauk and Fox attacks upon Omaha hunting parties continued until the early 1830's, while the Pawnees kept up their attacks upon the Omahas when the latter hunted on the plains. More serious, Sioux war parties repeatedly invaded the Omaha reservation, stole horses, burned dwellings, murdered members of the Omaha tribe, and twice forced the Omahas to abandon their villages and seek shelter near Bellevue. Indeed, the Omaha decision to sell northern portions of their reservation to the

Winnebagos was motivated by their desire to create a buffer against Sioux predation.

In the twentieth century, the Omaha and their property faced a different assault. "Special legislation" such as the Brown Act (1910) and the Brown-Stephens Act (1916) sponsored by politicians from the state of Nebraska also put Omaha assets at risk, and placed tribal allotments under a unique form of taxation that did not apply to other tribal people. Again, as in the past, the federal government, the very institution pledged to protect the Omaha people, facilitated a depletion of their assets.

4. The 1882 Land Act was opposed by most of the Omaha Tribe.

Although Alice Fletcher argued persuasively for the passage of the 1882 Land and Allotment Act, she did not have the support of the majority of the Omaha tribe. Fletcher's contacts among the Omahas were limited primarily to the La Flesche family and their allies, but as Judith Boughter has illustrated these "progressives" initially only wanted a "strong paper" guaranteeing the retention of their reservation. They envisioned allotments primarily as a hedge against removal to Oklahoma. They had no particular desire to sell reservation lands to non-Indians.[231] More traditional Omahas (the majority of the tribe) were even more opposed to the 1882 legislation since they disdained both allotment and the sale of reservation lands to white settlers.[232] Presbyterian missionaries

(who regularly supported allotment and small yeoman agriculture) reported that the majority of the Omahas wished "to keep their reserve," and wanted "to keep their tribal relations, continue to be Indians and live as Indians."[233] Even Alice Fletcher, perhaps the foremost proponent of the 1882 Land Act, eventually admitted that only one third of the Omaha tribe had supported the legislation and its subsequent consequences.[234]

5. The 1882 Land Act did not reflect any intent by Congress to diminish the reservation. The act sold individual acreages on the Omaha Reservation to non-Indians, but these tracts remained within the established boundaries of the reservation.

Comparisons of the language contained within the two treaties in which the Omahas sold land to the United States to be used as a reservation for the Winnebagos, and the 1882 Land and Allotment Act vividly illustrate that in the latter legislation, both the Omahas and the federal government agreed that the 1882 Land Act did not transfer the lands west of the railroad to the United States. In both of the treaties through which the Omahas sold lands to the federal government for the Winnebago reservation, the Omahas specifically agreed to "cede, sell, and convey to the United States a tract of land from the north side of their present reservation,"[235] or "sell and convey to the United States in trust for the Winnebago tribe of Indians, all the right, title, and interest of

the Omaha Indians"[238] In contrast, the 1882 Land Act contained no transfer of lands to the United States. The 1882 Land Act provided for the sale of individual tracts on the Omaha reservation to individual settlers or Indians.

Proceeds from the sale of these lands, after the sales were completed, were to be distributed to the Omaha tribe, but the Omahas did not relinquish their sovereignty over the region. **The 1882 Land Act contained no explicit language indicating the total surrender of all tribal rights to the region west of the railroad right of way.** It contained no explicit language indicating a relinquishment of title to the lands for any specific sum of money, not did it restore any land to the public domain. The Act contained no indication that the Omaha people would not have access to the region. **In contrast, it stated that the Omaha people were authorized to select allotments within the region west of the railroad.** The Land Act of 1882 did not specifically state what would happen to those individual acreages within the region which were not sold.

The legislative history of the Land Act of 1882, including an analysis of the discussions and debate in both the Senate and the House of Representatives illustrate that most members of Congress who participated in these discussions believed that the region west of the railroad would continue to be occupied by Omaha tribespeople after the Act passed. The focus of much of the debate in the Senate was upon how Omahas resident in the region west of the right of

way would be taxed. The legislative history of this Act indicates that the railroad was not envisioned by Congress as a dividing line between Omaha and non-Indian land. **The lands west of the right of way were envisioned as still part of the Omaha Reservation.**

Subsequent federal legislation and its accompanying correspondence reiterated that lands lying west of the railroad remained part of the Omaha reservation. Between 1886 and 1895, Congress passed four acts (1886, 1888, 1890, 1894) extending the payment schedule for settlers who had selected tracts of land west of the railroad on the Omaha reservation, and in each case the legislation refers to these tracts as located either **"in"** or **"on"** the reservation. Congressional reports focusing upon these extensions of payment also repeatedly refer to these tracts as located **"on"** the Omaha reservation. **Language contained within both the Land Act of 1882 and subsequent payment extensions indicate that *Congress had no intention of diminishing the reservation.***

In addition, in 1894 Congress, non-Indian settlers on reservation lands west of the railroad, and the Omahas themselves all agreed that these lands remained part of the reservation. In the 1894 Act that again provided for an extension of the payment schedule for the lands, Congress added a provision stating that **"this Act shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained. . . .**[237] At first, some

officials in the BIA stated that Omaha consent was not needed for such an extension, but when white settlers on these reservation lands west of the railroad also acknowledged that the Omahas retained an interest in the region and requested that the Omahas agree to the new payment schedule, the federal bureaucrats capitulated to the Congressional provision. In response, in December 1895, William Beck, the Omaha Indian agent, met with the Omaha tribal council which granted its permission for the payment schedules to be extended.[238] **Obviously, in 1895 Congress, the BIA, non-Indian settlers residing on reservation lands, and the Omahas themselves all tacitly agreed that the lands lying west of the railroad remained part of the Omaha reservation. The Land Act of 1882 did not diminish the Omaha Indian Reservation.**

6. Statistical information provided by the BIA is confusing, but indicates that the acreage on the Omaha Indian Reservation did not diminish in the years that followed the 1882 Land Act.

In 1881, prior to the passage of the 1882 Land and Allotment Act, The ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS indicated that the total acreage contained on the Omaha Indian Reservation encompassed 143,225 acres[239]. Subsequent ANNUAL REPORTS by the Commissioner in the two decades following the passage indicate no significant diminishment of this acreage. According to

the BIA's own statistics, the acreage encompassed on the Omaha Indian Reservation remained the same. In as late as 1900, the ANNUAL REPORT indicates that the Omaha reservation contained 142,343.79 acres,[240] essentially the amount of acreage contained in the reservation prior to the passage of the 1882 Land Act.

7. Omaha tribespeople continued to occupy and utilize lands west of the railroad following the 1882 Land Act.

Allotment policies and land purchase restrictions pursued by Hiram Price and other federal bureaucrats did much to limit Congressional intent to provide the Omaha people with continued access to reservation lands west of the railroad. As the Omahas discovered when they earlier had offered to sell allotments to the Poncas, it was difficult for traditional tribal people to contest the will of the Indian Department. Price preferred that they select allotments east of the railroad, and those Omahas who chose acreages west of the right of way incurred his displeasure.[241] Of course, no Omahas were allowed to purchase acreages west of the railroad. Although Congressional debate prior to the passage of the 1882 Land Act clearly demonstrates that it was the intent of Congress that Omahas be allowed to purchase acreages in the region, Price's decision to prevent them from doing so[242] effectively meant that even the few Omahas (for example, members of the La Flesche family) who had the resources to buy lands in the

region were prevented from making such purchases. It is not surprising that most reservation lands west of the railroad were soon purchased by non-Indians. Congressional intent was thwarted; bureaucratic intent prevailed. Policies initiated by Commissioner Hiram Price limited Omaha access to lands west of the railroad.

Pursuant to Section Eight of the 1882 Land and Allotment Act, fifteen Omahas did select allotments which were located (either totally, or in part) west of the railroad. These allotments encompassed approximately *935* acres west of the railroad right-of-way.[243] More important however was the active role that other Omahas played in the early development of Pender and Thurston County. Thomas Sloan and Hiram Chase resided, practiced their professions, and maintained businesses within the village of Pender. During the three decades following the passage of the 1882 Land and Allotment Act a member of the Omaha tribe (Thomas Sloan) was elected mayor of Pender and other Omaha tribesmen continued to serve Thurston County as county surveyors, tax assessors, county attorneys, and county judges.[244] Obviously, the Omahas maintained a presence on lands west of the railroad right-of-way and considered the region to be part of their reservation.

8. With a few exceptions, commercial, state, and federal cartographers have included the lands west of the railroad, particularly western Thurston County, as part of the Omaha Indian Reservation.

Commercial maps of the Omaha Indian Reservation and Thurston County Nebraska published by reputable publishers such as Rand-McNally and Encyclopedia Britannica between 1882 and 1915 generally include the lands west of the railroad as part of the Omaha reservation. Official road maps of the State of Nebraska ignored all Indian reservations in the state until 1972, then depicted the lands west of the railroad as part of the Omaha reservation. In 1975, state cartographers altered the map to exclude reservation lands in Cuming County, but continued to depict all of Thurston County, including the city of Pender as part of the reservation. For the next thirty years, Nebraska's official state road map continued to depict western Thurston County as part of the Omaha Reservation. This depiction remained unchanged until 2005, when at the request of officials in Thurston County, state cartographers re-drew the western boundaries of the reservation as lying at a new location east of Pender.[245] State cartographers have included Indian reservations on the official state road map of Nebraska since 1972. During thirty-three of these forty years (1972-2005) the cartographers and the State of Nebraska envisioned and portrayed lands west of the railroad in Thurston County to be part of the Omaha Indian Reservation. The state map

was altered only in 2005, primarily through the urging of local officials in Thurston County.[246]

In the decade following the enactment of the 1882 Land and Allotment Act (1884) federal cartographers continued to include the region west of the railroad as part of the Omaha Indian Reservation, and as late as November, 1961 BIA officials routinely described this region as within the reservations boundaries. In 1964, the BIA issued a map indicating that the Omaha Indian Reservation's western borders were those established by the boundary survey of 1855 and depicting that the lands west of the railroad were part of the reservation; but the map included a bracketed note written is small print which stated that since the region west of the railroad had been "Opened for Settlement," the boundaries of the Omaha reservation had been diminished.[247] The author of this anonymous note remains unknown, and since the note obviously was added after the map had been compiled and completed, the authority for this obviously added commentary remains uncertain. Since 1994, however, federal cartographers employed by the BIA have portrayed lands west of the railroad in Thurston County (including the village of Pender) as included within the Omaha Indian Reservation. Although county officials from Thurston County have petitioned the federal government to create new maps depicting the railroad right-of-way as the western boundary of the Omaha reservation, federal cartographers have steadfastly refused. According to Robert LaMacchia, Chief of the Geography Division for the

U.S. Census Bureau, **"while land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no legal opinion, federal court decision, Act of Congress, etc., has altered these boundaries."**[248] In the 21st Century, official maps of the Omaha Reservation compiled by the BIA, the United States Census Bureau, and other federal agencies continue to indicate that **Pender Nebraska and those sections of Thurston County lying south of the Winnebago Reservation, including the lands west of the former Sioux City and Nebraska Railroad right-of-way remain part of the Omaha Indian Reservation.**

9. Recent decisions by the Office of the Solicitor of the United States has declared that the Omaha Reservation has not been diminished.

On April 16, 2012, the Office of the Solicitor of the United States overturned a previous opinion delivered in 1989 by Marcia Kimball, an employee of that office, and declared that Kimball's opinion had been superseded and that the document containing her opinion should be withdrawn and no longer used or relied upon by the Field Solicitor in Minneapolis. According to the Office of the Solicitor of the United States, in April, 2012 that office concluded that **"the boundaries of the Omaha Indian Reservation have not been diminished."**[249]

In conclusion, the Omaha people have struggled mightily to retain control over their reservation lands in eastern Nebraska. In 2012, both Omaha tribespeople and federal officials consider the lands west of the old right-of-way, particularly western Thurston County and the village of Pender, to be part of the Omaha Reservation. As their petition of 1895 indicated, those settlers who moved onto these lands following the 1882 Land and Allotment Act agreed that the Omahas continued to exercise political hegemony over the land[250] Most modern residents of Thurston County, including the current county government seem to agree. According to the official website of Thurston County Nebraska, "Almost a decade before Nebraska became a state, the federal government established a reservation for the Omaha Indian tribe in what today is Thurston County. . . . Eventually the northern half of the reservation was purchased from the Omahas for use as a reservation for the Winnebago tribe."[251] And as the Thurston County website goes on to admit: **"The two reservations are still in existence today and *cover the entire Thurston County area.*"[252] Obviously, by Thurston County's own admission, the village of Pender and western Thurston County are located on the Omaha Indian Reservation.**

R. David Edmunds

Richardson, Texas

May, 2012

Endnotes

[1] For a general discussion of Omaha migrations prior to their contact with the Europeans see Margot P. Liberty, W. Raymond Wood, and Lee Irwin, "Omaha," in Raymond J. DeMallie, ed. PLAINS, VOL. 13 (PARTS 1 AND 2), of William C. Sturtevant, gen. ed., HANDBOOK OF NORTH AMERICAN INDIANS (15 vols.- ; Washington: Smithsonian Institution, 1978-), Vol. 13, Pt. 1, p. 399; Dale R. Henning, "Plains Village Tradition: Eastern Periphery and Oneota Tradition," in IBID., 232-233; G. Hubert Smith, ETHNOHISTORICAL REPORT ON THE OMAHA PEOPLE (New York: Garland Publishing Co., 1974), pp. 160-162. Also see H. Fontenelle, "History of the Omaha Indians," TRANSACTIONS AND REPORTS OF THE NEBRASKA STATE HISTORICAL SOCIETY, VOL 1 (Lincoln: State Journal Co., 1885), pp.77-78; and Alice C. Fletcher and Francis La Flesche, THE OMAHA TRIBE (2 vols.; Lincoln: University of Nebraska Press, 1992 – reprint), Vol. 1, pp. 34-39, 72-80.

[2] A good general discussion of the initial Omaha emigration into Nebraska can be found in Judith Boughter, BETRAYING THE OMAHA NATION, 1790-1916 (Norman: University of Oklahoma Press, 1998), pp.10-11; and in Tanis Thorne, THE MANY HANDS OF MY RELATIONS: FRENCH AND INDIANS ON THE LOWER MISSOURI (Columbia: University of Missouri Press, 1996), pp. 41-60. Also see Smith, ETHNOHISTORICAL REPORT, pp. 249-257.

[3] Boughter, BETRAYING THE OMAHA NATION, pp. 19-24; Thorne, THE MANY HANDS, pp. 106-110.

[4] Smith, ETHNOHISTORICAL REPORT, p. 248.

[5] Boughter, BETRAYING THE OMAHA NATION, pp. 25-26.

[6] James Ronda, LEWIS AND CLARK AMONG THE INDIANS (Lincoln: University of Nebraska Press, 1987), p. 20.

[7] "A treaty of peace and friendship between the United States of America . and the Chiefs and Warriors of the Mahas ," July 20, 1815, in Charles Kappler, comp. and ed., INDIAN TREATIES, 1778-1883 (Mattituck, N.Y.: Amereon House, 1972 – reprint), pp. 115-116.

[8] Liberty, Wood, and Irwin, "Omaha," p. 401; Smith, ETHNOHISTORICAL REPORT, pp. 103-106, 267-268.

[9] Boughter, BETRAYING THE OMAHA NATION, p. 43; Washington Irving, ASTORIA, OR ANECDOTES OF AN ENTERPRISE BEYOND THE ROCKY MOUNTAINS (Norman: University of Oklahoma Press, 1964 – reprint), pp. 159-160.

[10] Boughter, BETRAYING THE OMAHA NATION, pp. 30-31.

[11] "Treaty with the Makah Tribe," October 6, 1825, in Kappler, INDIAN TREATIES, pp. 260-262.

[12] ""Articles of a treaty made and concluded by the United States and the Sacs and Foxes; the Medawah-Kanton, Wahpacoota, Wahpeton, and Sissetong Sioux; the Omahas, Ioways, Ottoes and Missourias ," July 15, 1830, in Kappler, INDIAN TREATIES, pp. 305-310.

[13] IBID.

[14] The confusion over this treaty is discussed at some length in Boughter, BETRAYING THE OMAHA NATION, pp. 35-37; and in Thorne, THE MANY HANDS, p. 194. Also see Samuel Allis to Rev. David Green, February 8, 1847, in Richard E. Jensen, ed., THE PAWNEE MISSION LETTERS, 1834-1851 (Lincoln: University of Nebraska Press, 2010), 563-565.

[15] Good discussions of the Omahas' food shortages and participation in the liquor trade during the 1840's can be found in Boughter, BETRAYING THE OMAHA NATION, pp. 42-47; Thorne, THE MANY HANDS, p. 204-205; and David Wishart, AN UNSPEAKABLE SADNESS: THE DISPOSSESSION OF THE NEBRASKA INDIANS (Lincoln: University of Nebraska Press, 1994), pp. 86-88.

[16] Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (2 vols.; Lincoln: University of Nebraska Press, 1984), Vol. 1, 339-350; Robert Trennert, ALTERNATIVE TO EXTINCTION: FEDERAL INDIAN POLICY AND THE BEGINNINGS OF THE RESERVATION SYSTEM (Philadelphia: Temple University Press, 1975), pp. 55-60, 158-159.

[17] "Gatewood Treaty," January 27, 1854, in Letters Received, Office of Indian Affairs, M234, Roll 218, 195-199 Record

Group 75, National Archives (Microfilm). Hereafter materials cited from this source will be cited by the microfilm, roll and frame numbers (e.g.: M234, Roll 218, 195-199). Bold type in text inserted by author.

[18] Boughter, BETRAYING THE OMAHA NATION, pp. 63-64; "Treaty with the Omaha," March 16, 1854, in Kappler, INDIAN TREATIES, pp. 611-614.

[19] "Treaty with the Omaha," March 16, 1854, in Kappler, INDIAN TREATIES, pp. 611-614.

[20] IBID.

[21] IBID. Bold type in the text inserted by author.

[22] "Gatewood Treaty," January 27, 1854, M234, Roll 218, 195-199; Alfred Cummings to George Manypenny, February 20, 1854, IBID., 95; Manypenny to Robert McClelland, March 1, 1854, IBID., 188. Bold type in the text inserted by the author.

[23] "Gatewood Treaty," January 27, 1854, IBID, 195-199; "Treaty with the Omaha," March 16, 1854, in Kappler, INDIAN TREATIES, pp. 611-614.

[24] George Hepner to Alfred Cummings, November 12, 1854, M234, Roll 218, 130; Hepner to Cummings, February 8, 1855, IBID., 253-256; Affidavit by Thomas Griffy, January 4, 1856, IBID., 401-403.

[25] For example, see Enos Lowe to Augustus Dodge, November 27, 1854, IBID., 345; Petition by Citizens of Blackbird Hills, January 10, 1855, IBID., 355-356.

[26] George Hepner to Alfred Cummings, April 1, 1855, IBID., 263; Robert McClelland to the Commissioner of Indian Affairs, May 11, 1855, IBID., 364; Field Notes of the Boundary of the Omaha Indian Reservation, June 27, 1855, Land Division, Ancient and Miscellaneous surveys, Number 16, Vol. 3, Records Group 75, National Archives.

[27] Hepner to Cummings, November 12, 1854, November 12, 1854, IBID., 130; Hepner to Cummings, May 17, 1855, IBID., 273; Fletcher and LaFlesche, THE OMAHA TRIBE, Vol. 1, pp. 100-101.

[28] J. B. Robertson to George Manypenny, October 1, 1855, M234, Roll 218, 380-381. Also see Boughter, BETRAYING THE OMAHA NATION, pp. 75-76.

[29] Thorne, THE MANY HANDS OF MY RELATIONS, pp. 230-231. Also see Mark J. Awakuni-Swetland, "Make-Believe White Men and the Omaha Land Allotments of 1871-1900," GREAT PLAINS RESEARCH: A JOURNAL OF NATURAL AND SOCIAL SCIENCES, 4 (August, 1994), pp. 204-205.

[30] Robert Furnas to E. M Dole, May 3, 1864, M234, Roll 605, 139-141; Furnas to William Albin, August 26, 1864, IBID., 54; Boughter, BETRAYING THE OMAHA NATION, pp. 88-89.

[31] Robert Furnas to E. B. Taylor, October 24, 1865, M234, Roll 605, 330-332; Authorization by Omaha Chiefs and Headmen, February 6, 1865, IBID., 271-272.

[32] Clark Thompson and Robert Furnas to William Dole, March 10, 1865, M234, Roll 605, 277; Commissioner of the Land Office to N. G. Taylor, October 7, 1867, IBID, 787-788; "Treaty With the Omahas," March 6, 1865, in Kappler, INDIAN TREATIES, pp. 872-873; "Treaty with the Omaha," March 16, 1854, in IBID., pp. 611-614.

[33] "Treaty with the Omahas," March 6, 1865, in Kappler, INDIAN TREATIES, pp. 872-873.

[34] H. B. Denman to N. G. Taylor, February 8, 1868, M324, Roll 605, 812-814; Omaha chiefs to the President, February 8, 1868, IBID., 810-811.

[35] George Doane to the Commissioner of Indian Affairs, November 19, 1866, M234, Roll 605, 367-368; Furnas to E. B. Taylor, December 3, 1865, IBID., 407-410. Bold type in text inserted by author.

[36] Thorne, THE MANY HANDS OF MY RELATIONS, p. 238; Frank Ellick to the Secretary of the Interior, September 5, 1867, M234, Roll 605, 729-730; Frank Ellick to C.E. Mix, October 14, 1867, IBID, 732.

[37] James Harlan to the Commissioner of Indian Affairs, May 12, 1866, M234, Roll 605, 393; H. B Denman to the Commissioner of Indian Affairs, February 4, 1867, IBID., 549-551; J.E. Wilson to N. G. Taylor, August 8, 1867, IBID., 779-780;

Commissioner of the Land Office to N. G. Taylor, October 7, 1867, IBID., 787-788.

[38] Omaha chiefs to the Commissioner of Indian Affairs, June 3, 1869, M234, Roll 605, 961; George Painter to Samuel E. Janney, March 2, 1871, IBID, Roll 606, 40;

[39] Painter to Janney, August 16, 1869, M234, Roll 605, 1004-1007; Painter to Janney, October 14, 1870, IBID., 1158; Painter to Janney, April 8, 1771, IBID., Roll 606, 44-45.

[40] Painter to Janney, February 1, 1871, M234, Roll 606, 33-35; Painter to Janney, April 8, 1871, IBID., 48.

[41] Awakuni-Swetland, "Make-Believe White Men," p. 213.

[42] Janney to Eli S. Parker, November 8, 1870, M234, Roll 605, 1125-1126; Omaha Chiefs to Congress, October 27, 1871, IBID., Roll 606, 135-136; Boughter, BETRAYING THE OMAHA NATION, pp. 92-93.

[43] Painter to Janney, April 15, 1871, M234, Roll 606, 51-52; Omaha chiefs to Congress, November 11, 1871, IBID., 135-136. Also see "An Act for the Relief of Certain Indians in the Northern Superintendency," June 10, 1872, U. S. STATUTES AT LARGE, 17, 391-393. Bold type in text inserted by author.

[44] Advertisement in CINCINNATI TIMES AND CHRONICLE, April 1, 1873, in M234, Roll 606, 393-394; Advertisement in the NEW YORK INDEPENDENT, April 17, 1873, in IBID, 402; Advertisement in OMAHA REPUBLICAN, April 19, 1873, IBID, 449-450; Advertisement in CHICAGO POST, May, 1873, IBID., 460-461; "Bill for advertising sale of Omaha Indian Lands," June 9, 1873, IBID, 373; Elam Clark to the Secretary of the Interior, July 3, 1873, IBID, 382. Bold type in the text inserted by author.

[45] Barclay White to Hiram Chase, July 9, 1873, M234, Roll 606, 610-611; White to Edward O. C. Ord, July 17, 1873, IBID., 611-612; Edward Painter to White, August 29, 1873, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR 1873 (Washington: Government Printing Office, 1873), 191-193. Hereafter ANNUAL REPORTS OF THE COMMISSIONER OF INDIAN AFFAIRS will be cited as ARCIA, with the specific year for that document, i.e.: ARCIA, 1873.

[46] CONGRESSIONAL RECORD CONTAINING THE PROCEEDINGS AND DEBATES OF THE 47th CONGRESS, 1st SESSION, VOL. 13 (Washington: Government Printing Office, 1882), pp. 3027-3032, 3077-3079, 6537-6542, 6571-73, passim.

[47] T. T. Gillingham to Barclay White, December 13, 1873, M234, Roll 606, 676-677; Deed of Conveyance, July 31, 1874, IBID., 839-842. Bold type in text inserted by author.

[48] Minutes of a Meeting between the Omahas and Poncas, November 6, 1873, M234, Roll 606, 663-664; Barclay White to Edward Smith, September 5, 1874, IBID., 846; David Wishart, AN UNSPEAKABLE SADNESS: THE DISPOSSESSION OF THE NEBRASKA INDIANS (Lincoln: University of Nebraska Press, 1994), 206-208.

[49] ARCIA for 1874, p. 47; ARCIA for 1875, pp. 79-80. Also see Wishart, AN UNSPEAKABLE SADNESS, pp. 206-207.

[50] Francis Paul Prucha, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (2 vols.; Lincoln: University of Nebraska Press, 1984), Vol. 1, pp. 562-566. For a good account of the events culminating in the Ponca removal see Wishart, AN UNSPEAKABLE SADNESS, pp. 202-216.

[51] Jabe-ska to Gactagabi, 1878, in James Owen Dorsey, THE CEGIHA LANGUAGE, CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY, VOL. 6 (Washington: Government Printing Office, 1890), p. 673; Duba-ma-ci to Heqaga-sabe, October 25, 1878, in IBID, pp. 676-677; Unaji to Wesa-langa, 1879, in IBID., pp. 706-707; Mane-gahi to Louis Roy, May 24, 1879, in IBID., pp. 739-740.

[52] Omahas to the Editor of THE COUNCIL FIRE, February 5, 1878, THE COUNCIL FIRE, Vol. 1, (March, 1878), p. 42; Joseph La Flesche to A. B. Meacham, December 20, 1878, in Dorsey, CEGIHA LANGUAGE, pp. 677-682; Omahas to THE CINCINNATI COMMERCIAL, (1879), in IBID., pp. 755-762.

[53] Omaha Chiefs to the Commissioner of Indian Affairs, March 18, 1880, in James Dorsey, OMAHA AND PONCA LETTERS: BUREAU OF AMERICAN ETHNOLOGY PUBLICATION (Washington: U. S. Govt. Printing Office, 1891), pp. 82-85; Boughter, BETRAYING THE OMAHA NATION, pp. 93-94.

[54] T.T. Gillingham to E. B. Smith, June 4, 1875, M234, Roll 606, 831-832.

[55] George Wilkinson to the Commissioner of Indian Affairs, September 29, 1882, in ARCIA, 1882, 112-113.

[56] Omahas to the Editor, THE COUNCIL FIRE, February 5, 1878, Vol. 1, (March, 1878), p. 42; Tawa-gaxe-junga to A. B. Meacham, January 16, 1879, in Dorsey, CEGIHA LANGUAGE, 717-718; Omahas to THE CINCINNATI COMMERCIAL, (1879), in IBID., 755-762; Memorial of the Members of the Omaha Tribe of Indians for a Grant of Lands in Severalty, January, 11, 1882, U. S. Congress, Senate Miscellaneous Document No 31, 47th Cong . , 1st Session. pp. 1-12; Boughter, BETRAYING THE OMAHA NATION, pp. 92, 99.

[57] Barclay White to Edward Smith, July 22, 1875, M234, Roll 606, 933-934; George Wilkinson to the Commissioner of Indian Affairs, September 29, 1882, in ARCIA, 1882, pp. 112-113.

[58] Alice Fletcher to the Commissioner of Indian Affairs, October 6, 1890, National Archives, Record Group 75, 1890: Rcrds. of Comm. of Ind., Affrs. (31703), Series 4, Letters Received, 1881-1907 (transcript). This transcript of a letter from Fletcher to the Commissioner of Indian Affairs is in the possession of Nicole Tonkovich, an Associate Professor of Literature at the University of California at San Diego. Tonkovich is the author of THE ALLOTMENT PLOT: ALICE C. FLETCHER, JANE E. GAY, AND NEZ PERCE SURVIVANCE, which will be published by the University of Nebraska Press in November 2012.

[59] William Hamilton to John Lowrie, April 15, 1878, AMERICAN INDIAN CORRESPONDENCE: THE PRESBYTERIAN HISTORICAL SOCIETY COLLECTION OF MISSIONARIES LETTERS, 1833-1893 (Westport, CT: Greenwood Press, 1978), Microfilm. 35 Reels. Box E, Reel 1, Letter 39. Hereafter this collection will be cited as PRESBYTERIAN MISSIONARY LETTERS. Also see George Wilkinson to the Commissioner of Indian Affairs, August 27, 1883, in ARCIA for 1883, p. 105-107.

[60] Cata-jinga to T. T. Gillingham, (1878?), in Dorsey, CEGIHA LANGUAGE, pp. 693-695; Maqpiya-qaga to Cakucu-Cakitawe, (1879), in IBID., pp. 644-646.

[61] William J. Pollock to Carl Schurz, April 20, 1880, U. S. Bureau of Indian Affairs, Aberdeen Area Office, Land Title and Records Office, 380 Railroad Negotiations. (Hereafter documents from this archive will be cited as: BIA, Aberdeen Office).

[62] "Treaty with the Omaha," March 16, 1854, Kappler, INDIAN TREATIES, pp. 611-614; "Articles of an Agreement between the Omaha Indians and the Sioux City and Nebraska Railroad Company," April 19, 1880, BIA, Aberdeen Office, Land Title Records, 380/662. Also see William J. Pollock to Carl Schurz, April 20, 1880, IBID., Railroad Negotiations.

[63] Joseph La Flesche to J. B. Meacham, December 20, 1878, in Dorsey, CEGIHA LANGUAGE, pp. 677-682; Omahas to J. H. Hammond, June 1879, in IBID., pp. 750-754; Boughter, BETRAYING THE OMAHA NATION, pp. 94-95.

[64] Joan Mark, A STRANGER IN HER NATIVE LAND: ALICE FLETCHER AND THE AMERICAN INDIANS (Lincoln: University of Nebraska Press, 1988), p. 107.

[65] Fletcher to the Commissioner of Indian Affairs, October 6, 1890, National Archives, Record Group 75, 1890: Rcrds. of Comm. Ind. Affrs., (31703). Series 4, Lttrs. Recd., 1881-1907 (transcript). See endnote 58 above. Also see Fletcher to F. W. Putnam, September 26, 1888, Putnam Papers, UAV 677.45, MS 1, Peabody Museum Papers, Pusey Library, Harvard University Archives, Harvard University, Cambridge, MA. (transcript). This transcript is also in the possession of Nicole Tonkovich at the University of California at San Diego. See endnote 58 above.

[66] Boughter, BETRAYING THE OMAHA NATION, pp. 98-99, 118; Mark, A STRANGER IN HER NATIVE LAND, pp. 106-108. Also see Benson Tong, SUSAN LA FLESCHE PICOTTE, M.D.: OMAHA INDIAN LEADER AND REFORMER (Norman: University of Oklahoma Press, 1999), pp. 42-43.

[67] Boughter, BETRAYING THE OMAHA NATION, pp., 99, 118; Mark, A STRANGER IN HER NATIVE LAND, pp. 70-71; Memorial of the Members of the Omaha Tribe, January 11, 1882, Sen. Misc. Doc., No. 31, 47th Cong., 1st Sess., pp. 1-12.

[68] CONGRESSIONAL RECORD, 47 Cong., 1st Sess., December 7, 1881, Vol. 13, p. 48.

[69] IBID., February 20, 1882, Vol. 13, p. 1282.

[70] IBID., April 19, 1882, Vol. 13, pp. 3027-3028.

[71] IBID., p. 3028.

[72] IBID.

[73] IBID., p. 3029.

[74] IBID., pp. 3029-3030. Bold type in text inserted by author.

[75] IBID., pp. 3030-3031. Bold type in text inserted by author.

[76] IBID., p. 3032.

[77] IBID., April 20, 1882, Vol. 13, p. 3077.

[78] IBID., p. 3078. Bold type in text inserted by author.

[79] IBID. Bold type in text inserted by author.

[80] IBID.

[81] IBID.

[82] IBID., p. 3079.

[83] IBID., May 12, 1882, Vol. 13, p. 3880.

[84] IBID., July 1, 1882, Vol. 13, p. 5550.

[85] IBID., July 26, 1882, Vol. 13, 6537.

[86] IBID., p. 6538.

[87] IBID.

[88] IBID.

[89] IBID.

[90] IBID.

[91] IBID., 6538-6539.

[92] IBID., p. 6539.

[93] IBID., p. 6539-6540.

[94] IBID., p. 6540. Bold type in text inserted by author

[95] IBID.

[96] Ibid. Bold type in text inserted by author.

[97] IBID.

[98] IBID.

[99] IBID.

[100] IBID.

[101] IBID., pp. 6540-6541.

[102] IBID., p. 6541. Bold type in text inserted by author.

[103] IBID., pp. 6541-6542.

[104] IBID., July 27, 1882, Vol. 13, pp. 6571-6573. Bold type in text inserted by author.

[105] IBID., July 29, 1882, Vol. 13, p. 6628.

[106] IBID., August 3, 1882, Vol. 13, pp. 6842-6843.

[107] IBID., August 7, 1882, Vol. 13, p. 6998.

[108] For examples, see comments by Alvin Saunders, April 19, 1882, p. 2037; by Henry Dawes, April 19, 1882, p. 3029; by Dawes, April 20, 1882, p. 3077; by John T. Morgan, April 19, 1882, p. 3029; by John Ingalls, April 19, 1882, p. 3030; by Omar Conger, April 19, 1882, p. 3032; by Edward Valentine, June 26, 1882, p. 6539, 6541; and by Dudley Haskell, July 26, 1882, p. 6538, et al. All these comments and others can be found in the CONGRESSIONAL RECORD, 47th CONGRESS, 1st Session, Vol. 13. at the page numbers previously listed in this endnote.

[109] IBID., July 26, 1882, p. 6539.

[110] IBID.

[111] IBID., April 20, 1882, Vol. 13, p. 3077; IBID., July 26, 1882, pp. 6538-6539.

[112] IBID., April 20, 1882, Vol. 13, p. 3079.

[113] IBID., July 26, 1882, Vol. 13, pp. 6538-6539.

[114] IBID., April 20, 1882, Vol. 13, pp. 3077, 3079.

[115] IBID., July 26, 1882, Vol. 13, 6539.

[116] IBID., p. 6538.

[117] IBID., pp. 6537-6540.

[118] IBID., April 19, 1882, Vol. 13, pp. 3027-3032; IBID., April 20, 1882, Vol. 13, pp. 3077-3099.

[119] IBID., July 29, 1882, Vol. 13, p. 6628; IBID., August 3, 1882, Vol. 13, pp. 6842-6843.

[120] IBID., April 19, 1882, Vol. 13, p. 3027.

[121] IBID., 3029.

[122] "An Act to provide for the sale of a part of the Omaha Reservation," August 7, 1882, U.S. STATUTES AT LARGE, 22, pp. 341-343.

[123] IBID.

[124] Mark, A STRANGER IN HER NATIVE LAND, p. 93; Boughter, BETRAYING THE OMAHA NATION, pp. 99, 118-119.

[125] "Treaty with the Omahas," March 6, 1865, in Kappler, INDIAN TREATIES, pp. 872-873. Bold type in text inserted by author.

[126] Deed of Conveyance, July 31, 1874, M234, Roll 606, pp. 839-842. Bold type in text inserted by author.

[127] "An Act to provide for the sale of a part of the Omaha Reservation," August 7, 1882, U.S. STATUTES AT LARGE, 22, pp. 341-342. Bold type in text inserted by author.

[128] George Wilkinson to the Commissioner of Indian Affairs, September 29, 1882, in ARCIA, 1882, pp. 112-113; Comments by Alvin Saunders, U. S Congress, Senate, 47th Cong., 1st Sess., April 19, 1882, CONGRESSIONAL RECORD, 47th CONGRESS, 1st SESSION, Vol. 13, p. 3027.

[129] "An Act to provide for the sale of a part of the Omaha Reservation," August 7, 1882, Sec. 5, U.S. STATUTES AT LARGE, 22, p. 342-343.

[130] IBID. Bold type inserted in text by author.

[131] IBID. Bold type in text inserted by author.

[132] "An Act authorizing the Secretary of the Interior to extend the time of payment to purchasers of lands of the Otoe and Missouria and of the Omaha Indians," August 2, 1886, in ARCIA, 1886, p. 276. Bold type in the text inserted by the author.

[133] "Letter for the Secretary of the Interior transmitting, in response to Senate Resolution 31, 1888, information relative to sale of lands in the Omaha Reservation," February 14, 1888, U. S. Congress, Senate, 50th Congress, 1st Session, Executive Document No. 77, pp. 1-2; S.M. Stockslager to William F. Vilas,

February 9, 1888, in IBID.; H.L. Muldrow to the president of the Senate Pro Tempore, February 10, 1888, in IBID. Bold type in the text inserted by the author.

[134] "An Act for the relief of the Omaha tribe of Indians in Nebraska, to extend time of payment to purchasers of lands of said Indians, and for other purposes," May 15, 1888, U. S. Congress, STATUTES AT LARGE, 25, pp. 150-151. Bold type in text inserted by author.

[135] Zachariah Chandler to the Commissioner of Indian Affairs, August 31, 1889, 9 Public Lands, Dec. 326, 1889, WL, 691 (D.O.I).

[136] "An act extending the time of payment to purchasers of land of the Omaha tribe of Indians in Nebraska, and for other purposes." August 19, 1890, in ARCIA, 1890, p. 894. Bold type in text inserted by author.

[137] "Report from the Committee on Indian Affairs," March 8, 1890, U. S. Congress, House of Representatives, 51st Congress, 1st Session, Report No. 721, p. 1; "Report from the Committee on Indian Affairs," July 11, 1890, U. S. Congress, House of Representatives, 51st Congress, 1st Session, Report 2684, p. 1; "Report from the Committee on Indian Affairs, July 12, 1890, U. S. Congress, Senate, 51st Congress, 1st Session, Report 1491, pp. 1-2. Bold type in text inserted by author.

[138] "An Act extending the time of payment to purchasers of lands of the Omaha Indians in Nebraska, and for other purposes," August 11, 1894, in ARCIA, 1894, p. 438. Also see "Time of Payment for Lands of Omaha Indians in Nebraska," Report from the Committee on Indian Affairs, May 24, 1894, U. S. Congress, House of Representatives, 53rd Congress, 2nd Session, Report No. 958, pp. 1-3. Bold type in text inserted by author.

[139] "Extension of Payments for Omaha Lands," in ARCIA, 1896, p. 88.

[140] Opinion by E. A. Hitchcock, June 23, 1900, 30, Public Lands, Dec. 82, 1900 WL 1827 (D.O.I). Bold type in text inserted by author.

[141] ARCIA for 1885, p. lxii. Bold type in text inserted by author.

[142] George Wilkinson to the Commissioner, September 18, 1885, in IBID., 135-136.

[143] John Copley to J. C. Lowie, January 20, 1885, PRESBYTERIAN MISSIONARY LETTERS, Box H, Letter 207; William Hamilton to John C. Lowie, March 23, 1887, IBID., Box F, Letter 123.

[144] W. A. Mercer to the Commissioner of Indian Affairs, August 24, 1897, in ARCIA, 1897, pp. 178-180; Charles P. Mathewson to the Commissioner of Indian Affairs, August 31, 1899, in IBID., 1899, pp. 231-235. Official Bureau of Indian Affairs acreage reports for the Omaha reservation in both 1880 and 1881, before the passage of the 1882 Land Act, listed the Omaha Indian Reservation as containing 143,225 acres. See "Schedule showing the names of Indian reservations in the United States; agencies, etc." in ARCIA, 1880, p. 233; IBID., 1881, p. 266.

[145] ARCIA for 1871, p. 684.

[146] ARCIA for 1875, p. 318

[147] "An Act for the Relief of Certain Indians In the Northern Superintendency," in ARCIA for 1872, pp. 85-86. Also see the advertisements in the following newspapers: CINCINNATI TIMES AND CHRONICLE, April 1, 1873, in M234, Roll 606, 393-394; Advertisement in the NEW YORK INDEPENDENT, April 17, 1873, IBID., 402; Advertisement in the OMAHA REPUBLICAN, April 19, 1873, IBID., 449-450; Advertisement in CHICAGO POST, May 1873, IBID., 460-461. Also see "Bill for advertising sale of Omaha Indian lands," June 9, 1873, IBID, 373; Elam Clark to the Secretary of the Interior, July 3, 1873, IBID., 382. Bold type in text added by author.

[148] "Schedule showing the names of Indian reservation in the United States; agencies, etc.," in ARCIA, 1881, pp. 266-267.

[149] "Omaha Indian Reservation," 1884, Public Lands Division, Omaha File, In possession of author; "Land Seekers in Wild Dash to Claim Farms on April 30th, 1884," Ibid.

[150] "Schedule showing the names of Indian reservations in the United States, agencies, tribes occupying or belonging to the reservations, etc." in ARCIA, 1888, p. 366; "Statistics of Indian Lands," in IBID., p. 438.

[151] "Schedule showing the names of Indian reservations in the United States, agencies, tribes occupying or belonging to the reservation, etc." in ARCIA, 1892, pp. 902-903; IBID., 1895, pp. 476-477; IBID., 1899, p. 536; IBID., 1900, 608-609. Bold type in text inserted by author.

[152] Hiram Price to Alice Fletcher, April 21, 1883, Papers of Alice Fletcher and Francis La Flesche, Alice Fletcher Papers, Series 3, Correspondence n Specific subjects, 1881-1925, Box 3, Omaha Allotment, National Anthropological Archives, Suitland, Maryland. Hereafter this collection of papers will be cited as "Fletcher Papers."

[153] H.W. Partch to John Lowrie, August 7, 1883, PRESBYTERIAN MISSIONARY LETTERS, Box G, Reel One, 140; Mark, A STRANGER IN HER NATIVE LAND, pp. 88-93.

[154] William Hamilton to John Lowrie, April 15, 1878, PRESBYTERIAN MISSIONARY LETTERS, Box E, Reel 1, Letter 39; "Petition of members of the Omaha tribe of Indians in regard to citizenship and taxation, and praying for the payment of their annuities," December 22, 1887, in U. S. Congress, Senate, 50th Congress, 1st Session, Miscellaneous Document, No. 26, January 9, 1888, pp. 1-6. Bold type in text inserted by author.

[155] Mark, A STRANGER IN HER NATIVE LAND, p. 89; Boughter, BETRAYING THE OMAHA NATION, p. 104. Although a list of the "Original Owners of Allotments on Omaha Reservation" and a map of the original Omaha allotments (Plate 65) were included in Fletcher's and La Flesche's THE OMAHA TRIBE when the manuscript was published as the TWENTY SEVENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY (Washington: Bureau of American Ethnology, 1911), the list and accompanying map was not included when this volume was reprinted by the University of Nebraska Press (1992). The list of "Original Owners" can be found on pp. 643-654 in the B.A.E. REPORT (1911) listed above in this endnote, while the map of the allotments is included as "Plate 65" in the same volume. Also see http://www.accessgeneaology.com/native/omaha_indians/reservation_map9.htm; and http://www.accessgeneaology.com/native/omaha_indians/reservation_map7.htm.

[156] William Hamilton to John Lowie, April 15, 1878, PRESBYTERIAN MISSIONARY LETTERS, Box E, Reel 1, Letter 39.

[157] Mark, A STRANGER IN HER NATIVE LAND, pp. 88-93; SIXTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS FOR 1884 (Washington: Government Printing Office, 1885), 46.

[158] "Amendment to Act of Allotment," 1893, U.S. STATUTES AT LARGE, 27, pp. 630-631; Charles Mathewson to the Commissioner of Indian Affairs, August 20, 1900, in ARCIA, 1900, 275-279; Fletcher and LaFlesche, THE OMAHA TRIBE, p. 640. Also see Boughter, BETRAYING THE OMAHA NATION, p.154.

[159] "Sale and Disposition of Lands in Omaha Reservation in Nebraska," March 8, 1912, U.S. Congress, Senate Report No. 459, 62nd Cong., 2nd Sess., pp. 1-6; "An Act to provide for the disposal of the unallotted land on the Omaha Indian Reservation, in the State of Nebraska," May 11, 1912, in National Archives, Kansas City Depository, Winnebago Agency, Access 75-92-I-7, Box 246-274-325. Hereafter materials from this depository will be cited as NARS-KC. Also see "The Omaha Indians," December 16, 1915, U. S. Congress, Senate, Report No. 710, 64th Cong., 1st Sess., pp.1-2.

[160] Boughter, BETRAYING THE OMAHA NATION., 191-195.

[161] "An act to provide for part of the reservation of the Omaha tribe of Indians in the State of Nebraska, August 7, 1882, U. S. STATUTES AT LARGE, Vol. 22, pp. 341-343. Also see discussion of S. No. 1255 in pp. 27-42 above.

[162] CONGRESSIONAL RECORD, 47th Congress, 1st Session, July 29, 1882, p. 6573.

[163] Floyd A. O'Neil, "Hiram Price, 1881-1885," in Robert Kvasnicka and Herman J. Viola, THE COMMISSIONERS OF INDIAN AFFAIRS (Lincoln: University of Nebraska Press), 1979, pp. 173-174.

[164] Fletcher quoted in SIXTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS FOR 1884, p. 46. Also see Price to Fletcher, May 7, 1883, Fletcher Papers, Series

3, Box 3, Omaha Allotment; Price to Fletcher, September 14, 1883, IBID.

[165] Price to Fletcher, May 7, 1883, Fletcher Papers, Series 3, Box 3, Omaha Allotment. Bold type in text inserted by author.

[166] Price to Fletcher, May 7, 1883, IBID.

[167] IBID.

[168] O'Neil, "Hiram Price" in Kvasnicka and Viola, COMMISSIONERS OF INDIANS AFFAIRS, pp.173-179.

[169] CONGRESSIONAL RECORD, 47th Congress, 1st Session, April 19, 1882, p. 3027; IBID., July 26, 1882, pp. 6538, 6540.

[170] See pages 27-33 in text above.

[171] CONGRESSIONAL RECORD, 47 CONGRESS, 1st Session, April 19, p. 3031; IBID., April 20, 1882, p. 3078.

[172] IBID, April 20, 1882, p. 3078.

[173] Price to Fletcher, February 21, 1884, Fletcher Papers, Series 3, Box 3, Omaha Allotment.

[174] Rachel Beck to Edward Farley, August 21, 1894, La Flesche Papers, Nebraska State Historical Society; Entry for March 16, 1898, Rosalie Farley's Diary, IBID. Also see In'aska (Dennis Hastings) and Margery Coffey (Mi'onbathin), "Grandfather Remembers: Broken Treaties/Stolen Land: The Omaha Land Theft" (unpublished Ph.D. dissertation, Western Institute of Social Research, 2009), p. 791.

[175] Frederick E. Hoxie, "Thomas Sloan and the 'Good Citizenship Gun,'" PP. 17, 24. This is an unpublished manuscript in the possession of Frederick E. Hoxie. Also see In'aska and Coffey, "Grandfather Remembers," p. 751.

[176] THE PENDER TIMES, October 29, 1909, p. 1.

[177] Hoxie, "Thomas Sloan," pp. 26, 32; THE PENDER TIMES, October 29, 1901, p. 1.; In'aska and Coffey, "Grandfather Remembers," p. 751.

[178] "An Act to provide for the sale of part of the reservation ," August 7, 1882, in U.S. STATUTES AT LARGE, 22, p. 342; Jesse Warner to the Commissioner of Indian Affairs, September

11, 1889, in ARCIA, 1889, pp. 238-240; Boughter, BETRAYING THE OMAHA NATION, pp. 104-105.

[179] Charles Potter to the Commissioner of Indian Affairs, September 1, 1886, in ARCIA, 1886, pp. 186-188; Petition by the Omahas, December 22, 1887, U.S. Congress, Senate Miscellaneous Document No. 26, 50th Cong., 1st Sess., pp. 1-5; "Miss Fletcher Sadly Disappointed," COUNCIL FIRE, Vol. 10 (Feb., 1887), p. 27; "The Omaha Experiment a Failure," IBID., Vol. 10 (April-May, 1887), 61-62. Also see Benson Tong, "Allotment, Alcohol, and the Omahas," GREAT PLAINS QUARTERLY, Vol. 17 (Winter, 1977), pp. 23-27; Boughter, BETRAYING THE OMAHA NATION, pp. 106-107, 156-157.

[180] Boughter, BETRAYING THE OMAHA NATION, p. 106.

[181] Extract from inspections made by Inspector W. W. Jenkins on the Omaha and Winnebago reservations, May 29, and June 2, 1890, enclosures in T. J. Morgan to the Secretary of the Interior, February 26, 1891, in U. S. Congress, Senate Executive Document No. 73, 51st Cong., 2nd Sess., pp. 1-7; Rosalie Farley to Francis La Flesche, April 5, 1893, La Flesche Papers, Nebraska Historical Society; "Trouble With Leasing on the Omaha and Winnebago Reservations, Nebraska," in ARCIA, 1895, pp. 37-41. Also see Boughter, BETRAYING THE OMAHA NATION, pp. 137-141.

[182] Norman Kidd Green, IRON EYE'S FAMILY: THE CHILDREN OF JOSEPH LA FLESCHE (Lincoln: Nebraska State Historical Society, 1969), pp. 64, 82.

[183] IBID., p. 88; Rosalie Farley to Francis La Flesche, January 28, 1892, La Flesche Papers, Nebraska Historical Society.

[184] Rosalie Farley to Francis La Flesche, May 14, 1893, La Flesche Papers, Nebraska Historical Society ; Breckinridge and Breckinridge to William Beck, September 7, 1893, IBID.; Rosalie Farley to Francis La Flesche, July 29, 1895, IBID.; "Trouble With Leasing on Omaha and Winnebago Reservations, Nebraska," in ARCIA, 1895, pp. 37-41; William Beck to the Commissioner of Indian Affairs, August 20, 1895, in IBID, pp. 199-201. Detailed secondary accounts of these events can be found in

Green, IRON EYE'S FAMILY, pp. 88-96; and in Boughter, BETRAYING THE OMAHA NATION, pp. 143-155.

[185] http://thurstoncountynebraska.us/webpages/history/history.htm, p. 1.

[186] "An Act to provide for the sale of a part of the Omaha Reservation, August 7, 1882, U.S. STATUTES AT LARGE, 22, pp. 341-342; "Amendment to Act of Allotment," 1893, U.S. STATUTES AT LARGE, 27, pp. 630-631.

[187] "An Act making appropriations for the current and contingent expenses of the Indian Department ," May 27, 1902, U.S. STATUTES AT LARGE, 32, p. 275; THE PENDER TIMES, April 11, 1902, p. 1; IBID., July 25, 1902, p. 1; Boughter, BETRAYING THE OMAHA NATION, pp.172-174.

[188] THE PENDER TIMES, October 3, 1902, p. 1; Boughter, BETRAYING THE OMAHA NATION, pp. 175-177.

[189] Boughter, BETRAYING THE OMAHA NATION, pp. 177-179.

[190] Excerpt from THE PENDER TIMES, January 22, 1904, p. 1, in Richmond Clow Papers, University Library, University of Nebraska at Omaha, Omaha; Excerpt from THE PENDER TIMES, August 10, 1906, p. 1, in IBID. Hereafter citations to this collection will be cited as Clow Papers, UNO. Also see Petition by the Omahas, April, 1906, NARS-KC, Winnebago Agency, Box A-105; THE PENDER TIMES, October 29, 1909, p. 1.

[191] Janet A. McDonnell, "Land Policy on the Omaha Reservation: Competency Commission and Forced Fee Patents," NEBRASKA HISTORY, Vol. 63 (Fall, 1982), pp. 400-402; Boughter, BETRAYING THE OMAHA NATION, pp. 180-182.

[192] McDonnell, "Land Policy on the Omaha Reservation," pp. 401-402; Boughter, BETRAYING THE OMAHA NATION, pp. 181-182. Also see excerpt from THE PENDER TIMES, June 11, 1909, p. 1, Clow Papers, UNO.

[193] Excerpt from THE PENDER TIMES, August 13, 1909, p. 1, Clow Papers, UNO; THE PENDER TIMES, October 15, 1909, p. 1; McDonnell, "Land Policy on the Omaha Reservation," pp. 402-404.

[194] Boughter, BETRAYING THE OMAHA NATION, pp. 182-183.

[195] McDonnell, "Land Policy on the Omaha Reservation," pp. 403-405; Boughter, BETRAYING THE OMAHA NATION, pp., 183-185.

[196] McDonnell, "Land Policy on the Omaha Reservation," pp. 405-407; Boughter, BETRAYING THE OMAHA NATION, pp., 185-187.

[197] McDonnell, "Land Policy on the Omaha Reservation, pp. 406-407.

[198] "Report of E. B. Lineham, Chief Inspector, and E. H. Sweet, Jr., Inspector, on the Omaha Reservation, Nebraska, March 31, 1915," in Clow Papers, UNO; McDonnell, "Land Policy on the Omaha Reservation," pp. 407-408; Boughter, BETRAYING THE OMAHA NATION, pp. 187-190, 203.

[199] THE PENDER TIMES, June 23, 1905, p. 1; IBID., June 30, 1905, p. 5; IBID., July 28, 1905, p. 1; Boughter, BETRAYING THE OMAHA NATION, pp. 196-198;

[200] "Logan Ditch", in THE PENDER TIMES, May 7, 1909, Letter from the Secretary of the Interior to the Speaker of the House of Representatives, February 24, 1909, U. S. Congress, House Document No. 1479, 60th Congress, 2nd Sess., pp. 1-2; Boughter, BETRAYING THE OMAHA NATION, p. 198, 201.

[201] "An Act providing for the taxation of the lands of the Omaha Indians in Nebraska," May 6, 1910, U.S. STATUTES AT LARGE, 36, 348. A copy of this legislation can be found in NARS-KC, Winnebago Agency, 75-92-E-007, Box 38.

[202] IBID.

[203] "An Act to enable the people of Nebraska to form a constitution and for the Admission of such State into the Union. . ", April 19, 1864, U.S. STATUTES AT LARGE, 13, pp. 47-50.

[204] "An Act Providing for the Taxation of the lands of the Winnebago Indians and the Omaha Indians in the State of Nebraska," December 30, 1916, U.S. STATUTES AT LARGE, , 39, 865-866; THE PENDER TIMES, December 22, 1916, p. 1, in

Clow Papers, UNO; Boughter, BETRAYING THE OMAHA NATION, pp.201-203.

[205] Boughter, BETRAYING THE OMAHA NATION, p. 203; McDonnell, "Land Policy on the Omaha Reservation," p. 409; Wishart, AN UNSPEAKABLE SADNESS, P. 238; Clow, "Taxing the Omaha and Winnebago Trust Lands," pp. 1, 16-19; Mark Scherer, IMPERFECT VICTORIES: THE LEGAL TENACITY OF THE OMAHA TRIBE, 1945-1995 (Lincoln: University of Omaha Press, 1999), p. xv. By far the most detailed account of the loss of Omaha lands during these years can be found in In'aska and Coffey, "Grandfather Remembers," pp. 491-620, 791-795, 802-804, passim.

[206] Ormando W. Gray, ATLAS OF THE UNITED STATES (Philadelphia: O. W. Gray and Sons, 1873), Nebraska Plate.

[207] ENCYCLOPEDIA BRITANNICA (Chicago: The Encyclopedia Britannica, 1885), Nebraska Plate; ENLARGED BUSINESS ATLAS AND SHIPPING GUIDE (Chicago: Rand McNally Co., 1902), Nebraska Plate; NEBRASKA (Chicago: Rand McNally and Co., 1911), Nebraska Plate.

[208] Official State of Nebraska Highway Map, 1971.

[209] Official State of Nebraska Highway Map, 1972.

[210] Official State of Nebraska Highway Map, 1975.

[211] Mark Casey to Rose Braun, August 5, 2003, Archives, Nebraska Department of Roads, Lincoln, Nebraska.

[212] Official State of Nebraska Highway Map, 2007. Both the author and the archivist at the Nebraska Department of Roads searched through all the files in the Department of Roads Archives. These archives contained no maps dated between 2003 and 2006. Also see Jon Bruning, Milissa Johnson-Wiles, and Jody Fenner to Hobart Rupe, February 15, 2007, Omaha File, in possession of the author.

[213] Jon Bruning, Milissa Johnson-Wiles, and Jody Fenner to Hobart Rupe, February 15, 2007, Omaha File, in possession of the author. Bold type in text inserted by author

[214] "Diagram Showing the Township Lines, Guide Meridian, 6th Standard Parallel and the Boundary Lines of the Omaha and Winnebago Ind. Res. in Nebraska," January 31, 1884. A

copy of this map is in the possession of David Wishart, Professor of Geography, University of Nebraska, Lincoln, Nebraska.

[215] "Historical Summary for Omaha Reservation," November 30, 1961, in NARS-KC, Winnebago Agency, Access 75-92-I-7, Box 246-247-325, p. 4-7. Bold type in text inserted by author.

[216] Map of Omaha Indian Reservation, BIA, Aberdeen Office, Branch of Real Property Management, October 8, 1964.

[217] Map of Omaha Indian Reservation, BIA, Aberdeen Office, Branch of Real Property Management, October 8, 1964.

[218] Map of Omaha Indian Reservation, BIA, Aberdeen Office, Surface Ownership, August 3, 1994.

[219] Area Director, Aberdeen Area to Superintendent, Winnebago Agency, August 13, 1999, BIA, Aberdeen Office, Real Property Management, MC-306.

[220] "Omaha Reservation, USDI-BIA Aberdeen Area, GIS, Land Ownership Status as of August 8, 1996." This map contains a notation that it was compiled on March 28, 1999. Also see "Winnebago-Omaha Reservations, Land Ownership Status as of 10-09-99", Bureau of Indian Affairs, Branch of Realty, USDI-BIA Great Plains Regional GIS, May 16, 2000; and Robert La Macchia to Teri Lamplot, May 8, 2007. A copy of this letter is available in the Omaha tribal Archives.

[221] Map of Pender Village (38750), Omaha Reservation (2550), U. S. Census Bureau, U. S. Dept. of Commerce, January 1, 2000; Map of Pender Township (38767), Omaha Reservation (2550), U. S. Census Bureau, U. S. Dept. of Commerce, January 1, 2000.

[222] Robert LaMacchia to Teri Lamplot, May 8, 2007. A copy of this letter is available in the Omaha Tribal Archives.

[223] "Omaha Reservation", Bureau of Indian Affairs, Branch of Realty, USDI-BIA Great Plains Regional GIS, Land Ownership Status, September 20, 2006.

[224] 2007 Boundary and Annexation Survey Map, Cuming and Thurston Counties (173), U.S. Census Bureau, U.S. Dept. of Commerce, January 1, 2007; "Index for 2007 Boundary and Annexation Survey Maps," Basentity-ID 23117300000, Thurston County (173), U. S. Census Bureau, U.S. Dept. of Commerce,

2007; 2008 Boundary and Annexation Survey (BAS): Pender Village, (38750), U. S. Census Bureau, U. S. Dept. of Commerce, February 12, 2008.

[225] Marcia Kimball to David Jaeger, June 27, 1989, BIA, Aberdeen Office, Branch of Realty. Copies of this letter can be found in the Omaha Tribal Archives, and in the possession of the author. Bold type in text inserted by author.

[226] Patrice Kunesh to Priscilla Wilfahrt, April 16, 2012, BIA, Incoming Correspondence File, Winnebago Agency. A copy of this memorandum is in the possession of the author.

[227] Priscilla Wilfahrt to Alice Harwood, April 24, 2008, Letters Received, BIA, Great Plains Regional Office, Aberdeen, South Dakota.

[228] Kunesh to Wilfahrt, April 16, 2012, BIA, Incoming Correspondence File, Winnebago Agency.

[229] "Gatewood Treaty," January 27, 1854, National Archives, M234, Roll 218, 195-199.

[230] "Treaty with the Makah Tribe," October 6, 1825, Kappler, INDIAN TREATIES, pp. 260-262.

[231] Boughter, BETRAYING THE OMAHA NATION, p. 99.

[232] IBID., p. 118

[233] William Hamilton to John Lowrie, April 15, 1878, PRESBYTERIAN MISSIONARY LETTERS, Box E, Reel 1, Letter 39.

[234] Mark, A STRANGER IN HER NATIVE LAND, p. 93; SIXTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS FOR 1884, p. 46.

[235] "Treaty with the Omahas," March 6, 1865, in Kappler, INDIAN TREATIES, pp. 872-873.

[236] Deed of Conveyance, July 31, 1874, M234, Roll 606, pp. 839-842.

[237] "An Act extending the time of payment to purchasers of lands of the Omaha Indians in Nebraska, and for other purposes," August 11, 1894, in ARCIA, 1894, p. 438; "Time of payment for Lands of Omaha Indians in Nebraska," Report from the Committee on Indians Affairs, May 24, 1894, U. S. Congress,

House of Representatives, 53rd Congress, 2nd Session, Report No. 958, pp. 1-3. Bold type in text inserted by author.

[238] "Extension of Payments for Omaha lands," in ARCIA, 1896, p. 88.

[239] "Schedule showing the names of Indian reservations in the United States, agencies, etc.," ARCIA, 1881, p. 266.

[240] "Schedule showing the names of Indian reservations in the United States, agencies, etc.," ARCIA, 1900, pp. 608-609.

[241] Price to Fletcher, April 21, 1883, Fletcher Papers, Series 3, Box 3, Omaha Allotment; Price to Fletcher, May 7, 1883, IBID.; Price to Fletcher, June 4, 1883, IBID., Price to Fletcher, July 25, 1883, IBID.; Price to Fletcher, September 14, 1883, IBID.

[242] Price to Fletcher, February 21, 1883, IBID; Price to Fletcher, June 4, 1883, IBID; Price to Fletcher, July 25, 1883, IBID.

[243] Acreages quoted in the text were compiled and calculated by the author through an examination of the map of Omaha allotments included in the 27th ANNUAL B.A.E. REPORT, pp. 643-654, "Plate 65." A copy of this map can also be found at http://www.accessgeneaology.com/native/omaha_indians/reservation_map9.htm; and http://www.accessgeneaology.com/native/omaha_indians/reservation_map7.htm. Also see end note # 94, above.

[244] In'aska and Coffey, "Grandfather Remembers," p. 751; Hoxie, "Thomas Sloan," 24, 26, 32; THE PENDER TIMES, October 29, 1909, p. 1.

[245] Mark Casey to Rose Braun, August 5, 2003, Archives, Nebraska Department of Roads, Lincoln, Nebraska.

[246] IBID.

[247] "Map of Omaha Indian Reservation", BIA, Aberdeen Office, Branch of Real Property Management, October 8, 1964.

[248] Robert LaMacchia to Teri Lamplot, May 8, 2007. A copy of this letter is available in the Omaha Tribal Archives. Bold type in text inserted by author.

[249] Patrice Kunesh to Priscilla Wilfahrt, April 16, 2012, BIA, Incoming Correspondence File, Winnebago Agency. Bold type in text inserted by author.

[250] "Extension of payment for Omaha Lands," ARCIA, 1896, p. 88.

[251] http://thurstoncountynebraska.us/webpages/history/history.htm.

[252] IBID. Bold type and underlining in text inserted by author.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

OMAHA TREATY OF 3/6/1865

Washington, DC
March 10, 1865

Sir,

The undersigned being authorized by you to enter into treaty negotiations with the Omaha Tribe of Indians by which they were to cede a portion of their present Reservation for the purpose of locating the Winnebago Tribe of Indians thereon, have the honor to report, that they have performed the duty assigned them, and herewith transmit the treaty entered into.

Hoping that our labors in the premises may meet your approbation.

We are Very Respectfully

Your Obt. Servts
Clark W. Thompson
E. M. Furnas
Special Commissioners

Hon Wm. Dole
Commissioner of Indian Affairs
Washing DC

Department of the Interior
General Land Office
October 7, 1867

Hon N. G. Taylor
Council Indian Affairs

Sir:

Referring to our letter of the 14th August last, transmitting a portion of the plats and field notes of the survey of the Omaha Reservation in Nebraska, for the purpose of being copied. I have the honor now to transmit the plats and field notes of the remained of the survey, embracing the following townships viz: Township 2 North Ranges 10 & 11 East, Township 25 North Ranges 5 to 10 East, and Township 27 North Ranges 5 to 9 East 6th P.M. Also, a diagram showing the boundaries of the Reservation and the exterior of the townships embraced therein.

In this connection, I have to communicate to your office that the actual cost of the survey of the Omaha and Winnebago Reservations has exceeded the amount estimated by $3,362.03, and there existing no means at the disposal of this office wherewith to pay the same. I have to request that you cause a deficiency estimate to be submitted to Congress at as early a day as possible in order to meet the outstanding obligations incurred in the survey of the foregoing Reservations.

The area of the Winnebago Reservation is 97,497 acres and that of the Omaha Reservation 205,335

acres making a total of the former Omaha Reservation 302,832 acres.

I am, Sir

Very respectfully
Your Obt Servant

/s/ [illegible]

Commissioner

Indian
Treaties
1778-1883

COMPILED AND EDITED BY
Charles J. Kappler

WITH A NEW FOREWORD BY
Brantley Blue
Indian Claims Commissioner

AMEREON HOUSE
MATTITUCK, NEW YORK

* * *

[872] TREATY WITH THE OMAHA, 1865

Articles of treaty made and concluded at Washington, D. C., on the sixth day of March, A. D. 1865, between the United of America, by their commissioners, Clark W. Thompson, Robert W. Furnas, and the Omaha tribe of Indians by their chiefs, E-sta-mah-za, or Joseph Le Flesche, Gra-ta-muh-zhe, or Standing Hawk; Ga-he-ga-zbin-ga, or Little Chief; Ta-wah-gah-ha, or

Village Maker; Wah-no-ke-ga, or Noise; Sha-da-na-ge, or Yellow Smoke; Wastch-com-ma-nu, or Hard Walker; Pad-a-ga-he, or Fire Chief; or White Cow; Ma-ha-nin-ga, or No Knife.

ARTICLE 1. The Omaha tribe of Indians do hereby cede, sell, and convey to the United States a tract of land from the north side of their present reservation, defined and bounded as follows, viz: commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the river to the place of beginning: and that the said Omaha tribe of Indians will vacate and give possession of the lands ceded by this treaty immediately after its ratification: *Provided*, That nothing herein contained shall be construed to include any of the lands upon which the said Omaha tribe of Indians have now improvements, or any land or improvements belonging to, connected with, or used for the benefit of the Missouri school now in existence upon the Omaha reservation.

ARTICLE 2. In consideration of the foregoing cession, the United States agree to pay to the said Omaha tribe of Indians the sum of fifty thousand dollars, to be paid upon the ratification of this treaty, and to be expended by their agent, under the direction of the Commissioner of Indian Affairs, for goods,

provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation.

ARTICLE 3. In further consideration of the foregoing cession, the United States agree, to extend the provisions of article 8 of the treaty between the Omaha tribe of Indians and the United States, made on the 16th day of March, A. D. 1854, for a term of ten years from and after the ratification of this treaty; and the United States further agree to pay to the said Omaha tribe of Indians, upon the ratification of this treaty, the sum of seven thousand dollars as damages in consequence of the occupancy of a portion of the Omaha reservation not hereby ceded, and use and destruction of timber by the Winnebago tribe of Indians while temporarily residing thereon.

ARTICLE 4. The Omaha Indians being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person eighteen years of age and upwards, without family, not exceeding forty acres of

land – to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of [873] the agency for said Indians. The lands to be so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty shall constitute and be known as the Omaha reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him, shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and

regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress.

ARTICLE 5. It being understood that the object of the Government in purchasing the land herein described is for the purpose of locating the Winnebago tribe thereon, now, therefore, should their location there prove detrimental to the peace, quiet, and harmony of the whites as well as of the two tribes of Indians, then the Omahas shall have the privilege of repurchasing the land herein ceded upon the same terms they now, sell.

In testimony whereof, the said Clark W. Thompson and Robert W. Furnas, Commissioners as aforesaid, and the said chiefs and delegates of the Omaha tribe of Indians, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

Clark W. Thompson,
R. W. Furnas,
Commissioners

E-sta-mah-zha, or Joseph La Flesche,
his x mark. [SEAL.]
Gra-ta-mah-zhe, or Standing Hawk,
his x mark. [SEAL.]
Ga-he-ga-zbin-ga, or Little Chief,
his x mark. [SEAL.]
Tah-Wah-ga-ha, or Village Maker,
his x mark. [SEAL.]
Wah-no-ke-ga, or Noise, his x mark. [SEAL.]

Sha-da-na-ge, or Yellow Smoke,
his x mark. [SEAL.]
Wastch-com-ma-nu, or Hard Walker,
his x mark. [SEAL.]
Pad-a-ga-he, or Fire Chief, his x mark. [SEAL.]
Ta-su, or White Cow, his x mark. [SEAL.]
Ma-ha-nin-ga, or No Knife, his x mark. [SEAL.]

In presence of –

H. Chase, United States interpreter.
Lewis Saunsoci, interpreter.
St. A. D. Balcombe, United States Indian agent.
Geo. N. Propper.
J. N. H. Patrick.

Indian
Treaties
1778-1883

COMPILED AND EDITED BY
Charles J. Kappler

WITH A NEW FOREWORD BY
Brantley Blue
Indian Claims Commissioner

AMEREON HOUSE
MATTITUCK, NEW YORK

* * *

[611] **TREATY WITH THE OMAHA, 1854**

Articles of agreement and convention made and concluded at the city of Washington this sixteenth day of March, one thousand eight hundred and

fifty-four, by George W. Manypenny, as commissioner on the part of the United States, and the following-named chiefs of the Omaha tribe of Indians, viz: Shon-ga-ska or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Ta-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; So-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe.

ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however, That* if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel

express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

ARTICLE 2. The Omahas agree, that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may he.

ARTICLE 3. The Omahas relinquish to the United States all claims, for money or other thing, under former treaties, and likewise all claim [612] which they may have heretofore, at any time, set up, to any land on the east side of the Missouri River: *Provided*, The Omahas shall still be entitled to and receive from the Government, the unpaid balance of the twenty-five thousand dollars appropriated for their use, by the act of thirtieth of August, 1851.

ARTICLE 4. In consideration of and payment for the country herein ceded, and the relinquishments herein made, the United States agree to pay to the Omaha Indians the several sums of money following, to wit;

1st. Forty thousand dollars, per annum, for the term of three years, commencing on the first day of January, eighteen hundred and fifty-five.

2d. Thirty thousand dollars per annum, for the term of ten years, next succeeding the three years.

3d. Twenty thousand dollars per annum, for the term of fifteen years, next succeeding the ten years.

4th. Ten thousand dollars per annum, for the term of twelve years, next succeeding the fifteen years.

All which several sums of money shall be paid to the Omahas, or expended for their use and benefit, under the direction of the President of the United States, who may from time to time determine at his discretion, what proportion of the annual payments, in this article provided for, if any, shall be paid to them in money, and what proportion shall be applied to and expended, for their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements seeds, &c.; for clothing, provisions, and merchandise; for

iron, steel, arms, and ammunition; for mechanics, and tools; and for medical purposes.

ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and

enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, [613] and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature

shall remove the restrictions herein provided for, without the consent of Congress.

ARTICLE 7. Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed.

ARTICLE 8. The United States agree to erect for the Omahas, at their new home, a grist and saw mill, and keep the same in repair, and provide a miller for ten years; also to erect a good blacksmith shop, supply the same with tools, and keep it in repair for ten years; and provide a good blacksmith for a like period; and to employ an experienced farmer for the term of ten years, to instruct the Indians in agriculture.

ARTICLE 9. The annuities of the Indians shall not be taken to pay the debts of individuals.

ARTICLE 10. The Omahas acknowledge their dependence on the Government of the United States, and promise to be friendly with all the citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they

make war on any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Omahas commit any depredations on any other Indians, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens.

ARTICLE 11. The Omahas acknowledge themselves indebted to Lewis Sounsosee, (a half-breed,) for services, the sum of one thousand dollars, which debt they have not been able to pay, and the United States agree to pay the same.

ARTICLE 12. The Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Omaha who is guilty of bringing liquor into their country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 13. The board of foreign missions of the Presbyterian Church have on the lands of the Omahas a manual-labor boarding-school, for the education of the Omaha, Ottoe, and other Indian youth, which is now in successful operation, and as it will be some time before [614] the necessary buildings can be erected on the reservation, and [it is] desirable that the school should not be suspended, it is agreed that the said board shall have four adjoining quarter

sections of land, so as to include as near as may be all the improvements heretofore made by them; and the President is authorized to issue to the proper authority of said board, a patent in fee-simple for such quarter sections.

ARTICLE 14. The Omahas agree that all the necessary roads, highways, and railroads, which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money.

ARTICLE 15. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said George W. Manypenny, commissioner as aforesaid, and the undersigned chiefs, of the Omaha tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

George W. Manypenny, Commissioner. [L. S.]
Shon-ga-ska, or Logan Fontenelle,
his x mark. [L. S.]
E-sta-mah-za, or Joseph Le Flesche,
his x mark. [L. S.]
Gra-tah-mah-je, or Standing
Hawk, his x mark. [L. S.]
Gah-he-ga-gin-gah, or Little Chief,
his x mark. [L. S.]

Tah-wah-gah-ga, or Village Maker, his x mark. [L. S.]
Wah-no-ke-ga, or Noise, his x mark. [L. S.]
So-da-nah-ze, or Yellow Smoke, his x mark. [L. S.]

Executed in the presence of us:
James M. Gatewood, Indian agent.
James Goszler.
Charles Calvert.
James D. Kerr.
Henry Beard.
Alfred Chapman.
Lewis Saunsoci, interpreter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

IN THE OMAHA TRIBAL COURT
FOR THE OMAHA TRIBE OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, RICHARD M. SMITH, DONNA SMITH, DOUG SCHRIEBER, SUSAN SCHRIEBER, RODNEY A. HEISE, THOMAS J. WELSH, JAY LAKE, JULIE LAKE, KEITH BREHMER, and RON BRINKMAN,	**CIV. NO. 08-002**
Plaintiffs,	**DEPOSITION OF EMILY GREENWALD, Ph.D. TAKEN ON BEHALF OF THE DEFENDANTS**
vs.	
MITCHELL PARKER, In his official capacity as Member of the Omaha Tribal Council, BARRY WEBSTER, In his official capacity as Vice-Chairman of the Omaha Tribal Council, AMEN SHERIDAN, In his official capacity as Treasurer of the Omaha Tribal Council, RODNEY MORRIS, In his official capacity as Secretary of the Omaha Tribal Council, TIM	

GRANT, In his official capacity as Member of the Omaha Tribal Council, STERLING WALKER, In his official capacity as Member of the Omaha Tribal Council, and ANSLEY GRIFFIN, In his official capacity as Chairman of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control,

Defendants.

Julie A. Pell, RPR, CRR, CSR, CCR
www.pellreporting.com

Pell Reporting (402) 476-7160

[2] DATE: Wednesday, August 8, 2012

LOCATION: Husch Blackwell, LLP
Suite 2100
1620 Dodge Street
Omaha, Nebraska 68102
(402) 964-5000

TIME COMMENCED: 9:11 a.m.

TIME CONCLUDED: 1:41 p.m.

APPEARANCES

For the Plaintiffs:

MR. V. GENE SUMMERLIN, ESQ.
Husch Blackwell, LLP
610 J Street, Suite 200
Lincoln, NE 68508
(402) 434-8040 FAX (402) 434-8044
E-mail: gene.summerlin@huschblackwell.com

For the Defendants:

MS. NORA M. KANE, ESQ.
MS. PATRICIA A. ZIEG, ESQ.
Stinson, Morrison, Hecker, LLP
1299 Farnam Street, Suite 1500
Omaha, NE 68102
(402) 342-1700 FAX (402) 930-1701
E-mail: nkane@stinson.com
E-mail: pzieg@stinson.com

Also present:

DR. R. DAVID EDMUNDS
MR. RODNEY MORRIS

[3] INDEX

Appearances....2

Stipulations....4

Reporter's Certificate....118

Amendment to Deposition Page....119

WITNESS:

EMILY GREENWALD, Ph.D.
Direct Examination by Ms. Kane....5

EXHIBITS PREVIOUSLY MARKED: FIRST REF'D

2. 1872 Act....10

5. 1882 Act....22

6. 4/21/83 letter to Fletcher from Price....70

7. 5/7/83 letter to Fletcher from Price....70

11. 5/5/83 certificate of Wilkinson....69

EXHIBITS: MARKED

12. Dawes Act 85

[4] STIPULATIONS

It is stipulated and agreed by and between the parties hereto:

1. That the deposition of EMILY GREENWALD, Ph.D., may be taken before Julie A. Pell, Registered Professional Reporter, Certified Realtine Reporter, Certified Shorthand Reporter, Certified Court Reporter, General Notary Public, at the time and place set forth on the title page hereof.

2. That the deposition is taken pursuant to notice.

3. That the original deposition will be delivered to Ms. Nora Kane, attorney for the Defendants.

4. That all objections except as to form and foundation are reserved until time of trial.

5. That the testimony of the witness may be transcribed outside the presence of the witness.

6. That the signature of the witness to the transcribed copy of the deposition is not waived.

[5] EMILY GREENWALD, Ph.D.,

Of lawful age, being first duly cautioned and solemnly sworn as hereinafter certified, was examined and testified as follows:

(Witness' response to oath – "I do.")

DIRECT EXAMINATION

BY MS. KANE:

Q. Good morning. Could you introduce yourself, please?

A. I am Emily Greenwald.

Q. And have you been deposed before?

A. Yes.

Q. How many times?

A. Three or four.

Q. Have you ever – have you ever been hired to testify or offer your opinion in a diminishment case before?

A. No.

Q. Tell me about the times that you were engaged before and were deposed.

A. I worked on a case involving the Seneca-Cayuga Tribe's claim to land in the state of New York. I worked on a case involving – I'm

just trying to remember the ones that I've been deposed before. I worked on a case involving a uranium mine [6] **site on the Spokane Indian Reservation, and I worked on a tribal membership issue for the Yavapai-Prescott Tribe in Arizona.**

Q. And you were deposed in those three?

A. So I was deposed in those three cases, and I can't right now remember if there were any others.

Q. Okay. Tell me about the first one, the Seneca case. What was the issue in that case?

A. The issue was whether the Seneca-Cayuga Tribe of Oklahoma could claim land in the state of New York within the historic Cayuga Reservation and impose their own zoning laws, be outside of the local municipality's zoning laws, in a construction project. And Dr. Edmunds was also involved in that case.

Q. But that didn't touch upon diminishment? What was the issue of – you know, what did you have to resolve?

A. It was – it was a successor-in-interest issue, whether the Seneca-Cayuga Tribe was a successor in interest to the historic Cayuga nation.

Q. So when were you engaged in this case to offer your opinion on whether the Omaha Reservation was diminished?

A. I don't recall exactly. It was probably two [7] to three years ago.

Q. How did you begin your research?

A. I believe I looked at annual reports of the Commissioner of Indian Affairs; with the help of my colleagues, conducted research at the National Archives in Washington, DC.

Q. What did you find there?

A. We found correspondence related to the Bureau of Indian Affairs' – then the Office of Indian Affairs – role in overseeing the Omaha Tribe and reservation, correspondence relating to the allotment of the reservation. And we looked for later – any later records that dealt with jurisdictional questions in the area in dispute here, but didn't find anything.

Q. After what year? You didn't find anything after what year?

A. Well, I didn't find anything related to jurisdictional disputes –

Q. At . . .

A. – at the National Archives at all.

Q. All right. And the correspondence regarding allotment that you referenced, was that contemporaneous with the 1882 Act or the earlier treaties or both or neither?

[8] **A. The allotment-specific correspondence that we looked at had to do with the allotments that were made pursuant to the 1882 Act.**

Q. Did you find anything about allotments in any earlier documents?

A. In the agent's annual reports that are printed with the Commissioner of Indian Affairs' annual reports, I found some information about the allotments that were made under the 1865 Treaty.

Q. And what information was that?

A. Oh, I don't recall exactly. Just what allotments were made and when they were made.

Q. All right. And what's your definition of an allotment?

A. An allotment is a tract of land assigned to an individual Indian held in severalty or individually rather than tribally or collectively.

Q. Is there a time limit on how long that the individual Indian can hold the tract under an allotment?

A. I'm not quite sure what you're asking. The allotments were often made with a trust period attached to them during which there were restrictions against alienation of the tract. And once those restrictions were lifted, the individual or his or [9] **her heirs could hold it indefinitely, but they could also sell it.**

Q. Was there a traditional amount of time that that anti-alienation period applied, do you know?

A. The general allotment legislation passed in 1887 had a 25-year restriction. The 1882 Act at issue here is a sort of a precursor to that act, and I believe it also had a 25-year trust period.

Q. Did you find any such limitations in the earlier – in the treaty? 1865, you said?

A. I don't recall if there were limitations, but we could look at the treaty.

Q. Can an allotment be made on non-reservation land?

A. It depends on the statute. The 1887 Dawes Act had a provision for Indians to take allotments on public lands.

Q. Was there some provision, though, that public land had to have had some sort of historical Indian or reservation character?

A. Not in the Dawes Act that I recall.

Q. And that, as you said, came after the 1882 Act?

A. Right.

Q. So the public land exception that you re- – [10] or, not exception, but the public land provision that you referred to wouldn't apply to the 1882 Act?

A. No.

Q. All right. I want to talk about the 1872 Act, and that's Exhibit 2, which was marked yesterday. And I don't – since you've been deposed and you were here yesterday when Mr. Summerlin and – gave instructions on the deposition, I assume that you know the drill to try and wait till I'm done, and I'll try and do the same for you.

A. I do.

Q. Ask me to clarify a question if necessary.

I'm a little confused about some of the statements that you made in your report regarding the 1872 Act. Do you believe that – is it your opinion that the 1872 Act diminished the Omaha Reservation?

A. It's my opinion that the intent of the act was to diminish the reservation, and following this act the Bureau of Indian Affairs treated the Omaha Reservation as if it had been diminished by 50,000 acres.

Q. And do you believe that the BIA was correct in so treating the land as diminished following the 1872 Act?

A. I believe they – the way they treated it [11] **was consistent with what the 1872 Act intended.**

Q. And we know that pursuant to the 1872 Act, only about – is it 300 acres were sold?

A. Yes.

Q. Out of 50,000; correct?

A. Correct. Correct.

Q. Give or take. We'll say those numbers are fair and close. What's your opinion how the 47,000 remaining was held, then, between 1872 and 1882?

A. The – I don't have a particular opinion about how it was held. The Bureau of Indian Affairs regarded that land as already having been taken out of the reservation, even though it was not, in the interim, sold to anyone.

Q. Well, I believe in your report that you said in the interim it was held in trust by the United States?

A. I can't recall exactly what I said in my report. I'll be happy to look at it, but it was – it was not sold.

Q. Do you have a copy of your report?

A. I do.

Q. I don't want to waste time looking for it. I know it's in here. We can come back to that. But explain to me how, if the 1872 Act diminished the [12] reservation, that any sale under the 1882 Act would enure to the benefit of the Tribe?

A. The land wasn't sold under the 1872 Act, with the exception of roughly 300 acres. It's my opinion that the 1882 Act superseded or replaced the 1872 Act and then did accomplish the sale that the 1872 Act intended.

Q. But my question is: If the reservation was already diminished by the 1872 Act, how could any of the land be sold ten years later for the benefit of the Indians if it wasn't theirs?

A. I'm not following your question.

Q. Do you agree with me that the sale of the land in 1882 benefited the Omaha Tribe, that the monies benefited the Tribe?

A. I do.

Q. And that's what I'm trying to understand. If the reservation had already been diminished and that land was taken out of the reservation and was not on the Omaha Reservation anymore, how could it be sold for their benefit?

A. I – it wasn't actually sold. It was taken out of the reservation, but it had not yet all been sold. And so the 1882 Act changed the terms of sale somewhat. Conditions had

changed by 1882, primarily [13] **by the construction of the railroad through part of the reservation, and land became more appealing and was sold under the 1882 Act. It could have been sold under the 1872 Act at that time as well, but it appears that nobody wanted to buy the land under those terms.**

Q. Maybe it will help if you tell me what you believe diminishment means. If a reservation is diminished by 50,000 acres, what does that mean to the Omaha Tribe?

A. It would mean that the boundary of the reservation had changed. Okay. I think maybe I see what you're looking for. My opinion is that the 1872 Act didn't formally change the boundary of the reservation because it was not fully executed. But it did – following that act, the Office of Indian Affairs did treat the reservation as having been reduced by 50,000 acres.

Q. Did Congress?

A. Does that matter?

MR. SUMMERLIN: Object to form.

Q. (By Ms. Kane) Did Congress treat it as if it had been – the reservation had been diminished by 50,000 acres?

A. Congress did refer to the 1872 Act in [14] **debates leading up to the 1882 Act and clearly linked the two together and, in my opinion,**

understood the 1882 Act to be furthering the goals of the 1872 Act. And I don't – I did not investigate whether Congress specifically understood the reservation to be diminished.

I do believe that in this time period what Congress was trying to achieve was to reduce the size of reservations to reduce Indian land holding in general. That was consistent with federal policy in the period, so I think Congress understood the actions it was taking as reducing reservations.

Q. You asked me a moment ago if it mattered whether Congress treated the reservation as having been diminished.

A. (Witness nods head up and down.)

Q. Do you know what the primary criteria that the United States Supreme Court considers when looking into whether a reservation was diminished?

A. I have talked a little bit about these criteria with Mr. Summerlin, but I don't recall them right now.

Q. Do you know that the primary criteria that the United States Supreme Court looks at is the face of the act and what Congress said?

[15] **A. I don't know that specifically, but I . . .**

Q. All right. Well, I'll represent to you that that is the case. So tell me on the – on the face of the 1872

Act, if you can, where Congress stated that the reservation was diminished.

A. It's my opinion that the language that refers to the land to be taken from the western part of the reservation and to be separated from the remaining portion of the reservation is expressive of Congress' intent to diminish.

Q. Okay. So the words "taken" and "separated"?

A. Yes.

Q. All right. Do you have any authority from your research to support that conclusion that those two words are enough?

MR. SUMMERLIN: I'm going to object on form and foundation, and it's just not clear to me whether you're asking for an opinion as a historian or whether you're asking for an opinion related to a legal definition of diminishment.

Q. (By Ms. Kane) Do you understand my question?

A. I believe I understand your question. I don't have an opinion about whether those words legally are equivalent to diminish.

[16] Q. How about as a historian?

A. As a historian, I – yes, I believe those words are expressive of Congress' intent to diminish the reservation.

Q. And I'm asking you what support you have for that.

A. The con- – policy context of the period is my main support.

Q. Tell me what you mean by the "policy context of the period."

A. As I was saying earlier, it was the policy of the United States during this period to reduce the amount of land held by Indians, and it did so by negotiating cessions of land.

Q. Do you find language relating to cession of land – c-e-s-s-i-o-n – in the 1872 Act?

A. No.

Q. Do you find it in the 1882 Act?

A. No.

Q. Do you know that – do you know if or whether there are cases dealing with earlier diminishment of other reservations that did, indeed, use the language of cession?

A. I know generally that there are other cases dealing with diminishment, but I haven't looked at [17] **any specifically.**

Q. Do you recall whether the sale of the land to the United States for the benefit of the Winnebagos included the language of cession?

A. I can't remember the exact language in the treaty, but – yeah, I can't recall exactly.

Q. Would that make a difference to you if Congress used the language of cession or if the language of cession appeared in the treaty for the sale of the land to the United States for the benefit of the Winnebago, yet didn't use it in the language of the 1872 Act or the 1882 Act?

A. I don't find it particularly significant. Cession is a more explicit word, but I do think what was – what Congress was attempting to accomplish here was the equivalent.

Q. And, again, that's based on the use of, quote, taken, and, quote, separated?

A. Yes.

Q. Is there any language in the 1872 Act that references the land being restored to the public domain?

A. I don't recall. Oh, do you mean it – was the intent . . .

Q. No. I mean was – is there language in the [18] act that specifically says that the land, the 50,000 acres, would be returned or restored to the public domain?

A. I don't believe so.

Q. All right. How about in the 1882 Act?

A. No.

Q. All right. Okay. I want to go back to the Dawes Act for a moment. You testified that there's an article within the act that provides that Indians may take allotments on public land?

A. I believe – I believe it does.

Q. Was that article conditioned on the Indian already living on that land?

A. I don't recall.

Q. Okay. Now, you find the 1872 Act to be pertinent to the 1882 Act, obviously?

A. Yes.

Q. And tell me why.

A. Both acts dealt with the sale of lands from the western portion of the Omaha Reservation. In the Congressional debates that lead up to the 1882 Act, not the specific bill that became the 1882 Act, although there is one mention there, but more in a predecessor bill, there are clear linkages between the two acts.

[19] Q. Was that primarily comments made by a senator and a congressman from Nebraska?

A. I don't recall exactly.

Q. When the United States Supreme Court or anyone else considers legislative history, do you know whether that means they examine the debates or they

examine all laws that came before it pertaining to that land?

A. I can tell you as a historian, when I do a legislative history, I want to look for all precursor bills and how they were debated, everything that led up to the passage of the particular act.

Q. All right. The 1872 Act, you testified, changed the boundary of the reservation?

A. No.

Q. You testified that it diminished the reservation?

A. I had testified that following the 1872 Act, the Office of Indian Affairs treated the reservation as having been reduced by 50,000 acres.

Q. Diminished? They treated it as if it had been diminished; right?

A. I'd like to use the word "reduced."

Q. Well, the legal issue in this case is whether it was diminished, so I'd prefer that we [20] stick to what the legal issue in this case is. Is that all right with you?

A. That's fine.

Q. All right. And in your report you've said in various places that you believe that the BIA treated

the reservation as if it had been diminished following the 1872 Act; correct?

A. Yes.

Q. And your definition of diminishment is that it changes the boundary of the reservation; right?

A. Yes.

Q. And I'm still not clear on what you believe happens to that land that has been diminished. You've testified, on the one hand, it changes the boundary, but if all that land isn't sold in that 50,000 acres, what becomes of it? Whose is it?

A. I don't know.

Q. Does it remain with the Tribe until it's sold?

A. I believe that the – that the Bureau of Indian Affairs was treating the land at issue in the 1872 Act as if it had still – I am having a little trouble with this because I – there's – it's a gray area. I'm having trouble describing it. The land was treated as if it was taken out of the

* * *

[49] **R.W. Furnas.**

Q. Would you agree with me that it's fair for us to assume that the Tribe didn't author that document?

A. The Tribe did not write this. Correct.

Q. In this document does the Omaha Tribe – I'm sorry.

In this document is the language of cession used?

A. Yes.

Q. And that suggests, at least to me, and I'm asking if it suggests to you, that in 1865 the United States Government knew how to write a document to show diminishment?

A. I would say the United States certainly knew how to write documents to effect a cession.

Q. Do you have an opinion of why the United States Government didn't use language of cession in the 1872 Act or the 1882 Act?

A. I don't have an opinion as to why they didn't use that word. It could be because what they were contemplating was not a block transfer of land, but an opening up of land for sale. And so it's a different process from what the 1865 Treaty accomplished, but I do think Congress' intent was to [50] **take the 1872 sale area and the 1882 sale area out of the reservation.**

Q. What would – hypothetically, let's say that the 1882 sale was as unsuccessful as the 1872 sale. And let's not consider anything that happened later, but let's just for the moment consider it was – as unsuccessful.

A. Uh-huh.

Q. Do you believe that the land that was offered for sale lost its status as a reservation?

A. I would place it in that limbo category that I've been struggling with, and I would think if that had happened, if the land had not sold under the 1882 Act, that Congress would have needed to take some kind of action to remedy the situation because of the unclear status of that land.

Q. Do you believe that Congress saw the land as being in limbo? Is that language ever used in the debates? Sorry. That was compound. The – I object.

Do you believe that Congress considered the land to be in limbo at any time?

A. I do think that in the 1880 debate on a precursor bill to the 1882 Act that they understood this land to be in some uncertain status because it [51] **had been offered for sale and wasn't sold.**

Q. Do you – can you point to any document where – any document that has been produced in this litigation or relied upon by you or Dr. Edmunds where Congress expressed any kind of uncertainty of whether they were talking about reservation land or not?

MR. SUMMERLIN: Do you have the cite for that CR? Do you mind if I run to my office? I'm going to grab the documents we had yesterday.

MS. KANE: Yeah.

(A recess was taken from 10:32 a.m. to 10:46 a.m.)

Q. (By Ms. Kane) Okay. We're back on. Welcome back. Did you find any documents that you want to talk about to address the issue that we've been belaboring this morning?

A. I have a document that I wanted to talk about in response to your last question, which perhaps we should look back at.

(The pending question was read by the court reporter.)

A. Okay. I'm not sure this goes directly to that point, but the Congressional debate in 1880 over a bill that was a precursor to the 1882 Act does contain some references to the Act of 1872, and some [52] of the senators asked why are we even contemplating this legislation because there's already an act out there that provides for this sale. So there was some uncertainty in Congress about what was going on there, but I don't know that it goes directly to the point of whether they thought of it as reservation land.

Q. (By Ms. Kane) And I think – and you tell me if you think this is a fair assumption about that debate. They knew that they or their predecessors had passed an act to sell that land, and that act was still in place, and here we are, we have another act for the sale of the same land, and they wanted to

know why, why they needed another one, had the other one expired and et cetera; is that fair?

A. Yes.

Q. Do you agree with me that part of the reason, at least part of the reason for a subsequent bill was because of the improvement of the – having the railroad go through the land?

A. Yes.

Q. And, therefore, the Omahas were hoping or – or the Omahas or the government or somebody was hoping to get a higher price?

A. I think that was part of it. I think the [53] **main issue was that the land hadn't actually sold under the 1872 Act, and some of the documents give some possible reasons why that – why the land had not sold, and the 1882 Act created slightly different terms of sale that I think were designed to make it easier to sell the land.**

Q. Do you believe that those documents or any other documents support your opinion that the land was in limbo?

A. I've already lost track of what I just talked about.

(The previous question and answer were read by the court reporter.)

A. I don't think any of those documents go directly to that issue. I would have to look at them again.

Q. (By Ms. Kane) All right. Tell me what you mean by "limbo."

A. That its status was unclear.

Q. So its status was unclear. No one knew who owned it?

A. I'm not saying no one knew who owned it. I'm saying that I think the legal status of the land was unclear.

Q. Well, who could sell the land between 1872 [54] and 1882?

A. The United States.

Q. How is that unclear on who had rights to the land or who owned it?

A. I do believe the United States had ownership and control of the land, but what its legal status was, I don't know.

Q. Do you believe that it was held in trust by the United States?

A. I don't know.

Q. Do you believe that it was held in fee simple by the United States?

A. I don't know, but I think that's unlikely.

Q. If it's not fee simple and it's not trust, what else could it be?

A. I don't know. I'm not familiar with other categories of land holding.

Q. So we can cross out fee simple. If it's – if it's held in trust, let's assume that it is, and the United States sells it, it goes to whoever the land was held in trust for; correct?

A. The proceeds would go –

Q. The proceeds of the sale?

A. – would go to the – whoever the United States held the land in trust for.

[55] Q. And here it was – the proceeds went for the benefit of the Omahas?

A. That's correct.

Q. So can we assume that the United States held it in trust for the Omahas?

A. I'm still not comfortable going to that point because I just don't know what the legal status was.

Q. All right. Before we broke I gave you the hypothetical that the 1882 sale was as unsuccessful as the '72; right?

A. Right.

Q. And I believe that you testified when I asked about the status, I don't recall the exact wording of my question, but I believe that you responded that you thought that Congress would have to do something further in order to sort that out?

A. I think that the situation might have been sufficiently ambiguous about the status of that land that Congress would have needed to take further action or it might have wound up being researched by the solicitor for an opinion or it might have been the subject of litigation. I think that questions would have arisen about the ownership of that land.

Q. All right. And do you know whether, when [56] the status of land that may or may not be Indian land is ambiguous, do you know if there's a provision in the law that provides that one side is to be preferred in sorting out that ambiguity?

A. Are you talking about a specific law?

Q. I'm talking about a tenet of common law construction.

A. I'm . . .

MR. SUMMERLIN: Object on foundation.

A. I'm not really familiar with the tenets of common law.

Q. (By Ms. Kane) All right. And that's fair. I'm reading to you from the United States Supreme Court opinion *South Dakota vs. Yankton Sioux Tribe* in

which Justice O'Connor stated – this was a diminishment inquiry into the status of certain Yankton Sioux Reservation in South Dakota, and she stated "Throughout this inquiry," quote, "we resolve any ambiguities in favor of the Indians and we will not lightly find diminishment," unquote.

Have you ever come across that expression of law before?

A. The construction of ambiguous language in a treaty, I –

Q. Yes.

[57] **A. – I have.**

Q. And this is not applicable to a treaty. It's applicable to an act.

A. Okay.

Q. You've heard of it in the context of a treaty, that ambiguities are to be construed in favor of Indians?

A. Yes.

Q. Did you know that the same was true in the construction of a statute or an act?

A. I am not surprised that that's true. I can't recall if I have run across that before.

Q. Well, under our hypothetical, when you said that it was sufficiently ambiguous that something would have had to have been done, is it fair to say

that whatever needed to be done would have been done in a light favorable to the Indians?

MR. SUMMERLIN: Object on foundation. Calls for a legal conclusion.

A. I don't know, because I was talking about a remedy made by Congress or possibly an opinion offered by the solicitor, and I don't know how they would have construed that or whether they would have been bound by the Supreme Court's precedence on construction.

[58] Q. (By Ms. Kane) Your opinion is that if the 1882 sale had been as unsuccessful as the 1872 sale that there would be sufficient ambiguity that something would need to be decided, whether it was how the land was held and who had rights to it; correct? I'm paraphrasing, but correct me if I've got it wrong.

A. Right. No, I – I'm saying that I think that likely there would have been an issue. I can't say whether there would have or not.

Q. Well, the same ambiguity would have existed between 1872 and 1882; correct?

A. I think – exactly. I think that's why I'm having such a difficulty with that period.

Q. Okay. Okay. All right. Well, let's go back to the 1872 to 1882 period. Do you find anything in the historical documents to show that Congress thought there was an ambiguity whether they had to resolve

whether it was reservation land or not before they advertised it for sale as reservation land?

A. Are you asking whether they had any uncertainty prior to 1872 about whether it was reservation land?

Q. No. I'm asking you, the hypothetical that [59] we talked about was 1882 having the same issues as 1872.

A. Okay.

Q. So now we're back to 1872, post sale. 300 acres have sold. And in the hypothetical that's where we were. And under the hypothetical you said there would be sufficient ambiguity, Congress would have to do something. So between 1872 and 1882, did Congress have to do anything to resolve an ambiguity before they sold it?

A. Well, Congress did do something here because the land had not sold. It passed the 1882 Act and tried to create better conditions for the land to sell.

Q. Price being one?

A. I believe price was a factor. The . . .

Q. Anything else that you can think of?

A. That was a factor?

Q. Yes.

A. I think the construction of a railroad line through was a factor. I think the fact that – hold on. I'm not sure exactly what I'm responding to now. The reasons why land did not sell under the 1872 Act, I think, were price and the terms of sale. The reasons for the land – for the 187- – 1882 Act to [60] **replace the 1872 act had to do with changing the terms of sale and recognizing that the value of the land had likely increased because the railroad was constructed through there and the railroad right-of-way provided a convenient line to designate the block of land to be sold, whereas previously it had been a line running along the section lines.**

Q. But none of those items that you've just discussed address the character of whether the land was reservation land or not, did it?

A. No.

Q. And, in fact, the 1882 Act states that the land to be sold is, quote, "All that portion of their," t-h-e-i-r, referring to the Omaha Tribe of Indians – so I'll go back and start the quote again. "All that portion of their reservation in the state of Nebraska lying west of the right-of-way granted by said Indians to the Sioux City and Nebraska Railroad Company," et cetera. Is it not clear in the 1882 Act that what is being offered for sale is a portion of the Omaha Indian Reservation?

A. I would agree that's how it is stated in the act.

Q. Is that not then conclusive that it was, indeed, reservation land being sold?

* * *

[65] reservation land to a white – or to a non-Indian settler is an act of diminishment?

A. No.

Q. So the sale isn't a diminishment, but the nonsale might be. I just can't follow you on how it was not reservation between 1872 and 1882. The two sales of 300 acres did not diminish it; correct?

MR. SUMMERLIN: Object to form.

MS. KANE: What's the matter with the question?

MR. SUMMERLIN: That was a paragraph long.

MS. KANE: You're objecting to the length of the question?

MR. SUMMERLIN: Well, I think it was – it was – there were multiple questions contained within that.

Q. (By Ms. Kane) Did you understand my question?

A. I'm . . .

Q. And I'll ask it again.

A. Go ahead.

Q. You just testified that the mere sale to non-Indian settlers is not an act of diminishment; correct?

A. In general, correct

[66] Q. All right. So the 1872 sale involved two sales to non-Indian settlers; correct?

A. Yes.

Q. Were those acts of diminishment?

A. I don't – I can't evaluate them within the legal framework of diminishment because I don't know it as an attorney. I don't know what the status of those two parcels of land were in this period of – strike that. I don't have further answer there.

Q. Well, you were hired in this case to give an opinion on whether the Omaha Reservation was diminished.

A. Yes.

Q. And have you not fully educated yourself on what acts would constitute an act of diminishment?

A. I have looked at the documents that appear to be central to this litigation, but I haven't read broadly about the subject of diminishment and what the legal thresholds are. I've discussed them in some general terms with Mr. Summerlin.

Q. How could you form an opinion on whether the Omaha Reservation was diminished without understanding comprehensively what diminishment means?

A. I approached this as a historian and [67] **whether, in my opinion, this act had the effect of moving the reservation boundary. And in my opinion it did. I understand that to be consistent with diminishment.**

Q. And which act are you referring to in that answer?

A. Well, the 1882 Act in particular, but I see the 1872 Act as a precursor to that.

Q. Did the 1872 Act diminish the reservation?

A. It intended to, but it was not executed. So I would say no, it did not. It did not, in effect, diminish the reservation.

Q. So then does that help you with the question of whether the unsold land following the 1872 Act remained reservation or not?

A. I still feel like there's some ambiguity about what the status is.

Q. Well, how could the 1882 Act diminish a reservation if it wasn't a reservation?

A. I see your confusion. The 1882 Act, in my opinion, completed what the 1872 Act intended to accomplish, but didn't, in fact,

because it was not successfully implemented. If it – I'll stop there.

Q. Okay. If the 1872 Act in and of itself had successfully diminished the reservation, sale or no [68] sale, just the act on its face, was the 1882 Act superfluous?

A. If it had diminished the reservation on its face. Do you mean if it contained more explicit language?

Q. Yes.

A. If it had contained more explicit language, the 1882 Act probably – I think the 1882 Act might have still occurred, or something like it, if the terms of sale in the 1872 Act were as they were because it seems that the terms of sale posed a particular problem for getting the land sold.

So if the 1872 act had been more explicit about the effect of the act on the boundary of the reservation, there still might have been an issue about selling the land that would have triggered the need for subsequent legislation.

Q. And the 1882 Act has language that is no more specific about whether it's meant to be an act of diminishment than the 19- – or the 1872 Act; correct?

A. It is not explicit.

Q. Okay. I'm glad that you appreciated my confusion. I really – I don't get it. You agree that the 1882 Act did not provide for a sum certain

* * *

[117] SO . . .

THE WITNESS: Okay.

MR. SUMMERLIN: Okay. We'll step out and leave you guys in here.

(A recess was taken from 1:35 p.m. to 1:41 p.m.)

MS. KANE: We can go back on, and I'll tell you I don't have anything further.

THE WITNESS: Okay.

MS. KANE: And I appreciate it very much. Thanks for your time today.

THE WITNESS: You're welcome.

MR. SUMMERLIN: We'll read and sign.

(The deposition concluded at 1:41 p.m.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

HISTORICAL SUMMARY FOR OMAHA RESERVATION

Creation of the Reservation

The first attempt of the United States to provide a reservation for the Omaha Indian Tribe is found in the Treaty of July 15, 1830 (7 Stat. 328), executed at Prairie du Chien, in Michigan Territory. By this Treaty, the Omahas, along with several other tribes, ceded to the Federal Government a tract of land which included what is today western Iowa and portions of Minnesota and Missouri. This Treaty created a reservation for Omaha half-breeds in the extreme southeast corner of modern Nebraska and expressed an understanding that the land ceded was to be used to provide allotments to the inhabitants. Later, the United States was released from these provisions by the Treaty of October 15, 1836 (7 Stat. 524), at Bellevue, Upper Missouri. Then, on March 16, 1854, a delegation of chiefs and warriors signed a treaty in Washington, D.C. (10 Stat. 1043), by which they relinquished their claims to all tribal lands with the exception of a tract on the Ayoway (Iowa) River. This tract was to become the Omaha Reservation, unless the Indians found it to be unsuitable. In a letter to the Secretary of the Interior on May 9, 1855 (Council Bluffs file 989), the Commissioner of Indian Affairs reported that the site did not meet with the

approval of the Tribe, that the Indians refused to go there, and they they had selected instead an area in the Blackbird Hills. The reply of the Secretary on May 11, 1855, is the only known approval of that location as their reservation expressed by the Executive Department of the Federal government:

> "I approve the recommendation of your letter of the 9th inst., on the subject of locating the Omahas upon the tract of country known as the 'Blackbird Hills', which they have selected with the approbation of the President, and request that you will give Agent Hepner the instructions necessary to enable him to carry out your suggestions, so that the country selected may be properly secured to the Indians as their future home, and its occupation and settlement by white persons prevented.

In a letter dated March 11, 1935 (7169-35-307.4 General Service), reviewing this correspondence, Commissioner John Collier commented:

> " . . . but no written order or document of any kind over the signature of the President has been found. . . . it is assumed from the information at hand that the matter was taken, up informally with the President, and that his approval was oral and never put in writing."

The United States and the Omaha Tribe concluded a fourth treaty on March 6, 1865 (14 Stat. 667), by which a tract in the northern part of the reservation

was sold to the Government, to be used as a home for the Winnebago Indians. Article IV of this treaty is the first official pronouncement of the existence of the Omaha Reservation.

On June 10, 1872, Congress authorized the sale of 50,000 acres from the west end of this reservation (17 Stat. 391), should the tribe consent to such a sale, but in spite of tribal approval, the land was not sold, and the act was superseded by that of August 7, 1882, infra.

Another Congressional Act on June 22, 1874 (18 Stat. 146, at page 170), allocated funds to the Winnebago Tribe to be used in the purchase of additional lands from the Omaha Reserve. Under authority of this Act, the Omaha land holdings were distinguished by deed dated July 31, 1874 (Indian Office Miscellaneous deeds, Vol. 6, page 215), for 12,347.55 acres. This was the last action affecting the existence of the original reservation.

Three more Acts of Congress, however, authorized the sale of lands within its borders. On August 7, 1882 (22 Stat. 341), Congress authorized the sale of that part of the Omaha Reservation which was situated west of the Sioux City and Nebraska Railroad right-of-way, consisting of 50,157.27 acres, and again on March 3, 1885 (23 Stat. 362, at page 370), the sale of a portion of this same tract was authorized. The Act of May 11, 1912 (37 Stat. 111), enacted to provide for the sale of unallotted lands east of the railroad right-of-way, as amended and continued by the Act of

January 7, 1925 (43 Stat. 726), was never used as the statutory basis for the disposition of tribal lands. Both of these Acts have subsequently been superseded by the prohibition against the transfer or sale of restricted lands, excepting only purchases by the tribal organization and exchanges for the purposes of consolidation, contained in section 4 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). The provisions of this Act apply to the Omaha Tribe by virtue of their consent thereto given by secret ballot conducted on October 27, 1934 (Indian Office File 4894-1934-066-General Service).

Boundaries

Subsequent to the Secretary's approval in 1855 of the establishment of the Omaha Indians on the site of their present reservation, the area was surveyed and the original boundaries were established. These remain unaltered today, except that they now contain the Omaha and the Winnebago Reservations. The surveyor's Field Notes set them forth as follows:

> "The South East corner is known as the mouth of Woods Creek or the point where said creek empties in the Missouri river, thence running due West six miles two hundred ninety eight (298) rods to the South branch of Blackbird Creek, said Creek is 15 feet wide and has a cotton wood sight tree on the East bank of 16 inches diameter, thence west six miles 160 rods to Middle Creek, said Creek is 25 feet wide, and runs to the South, thence West 16 miles 202 rods to the South West

> Corner of the Reservation and known as a mound, two and one half feet in diameter and two feet high with the sod taken from the South Gide and said mound is further described as being 16 rods south and 60 rods West of a small branch creek, thence North 15 miles 260 rods to Middle Creek, said Creek is 24 feet wide and runs to South West, thence North 2 miles 60 rods to North West Corner and said Corner is known as a mound 3 feet in diameter and 2 feet 6 inches high, sod taken from the West, thence East 17 miles 252 rods to South branch of Omaha Creek, said Creek is 15 feet across, thence East three (3) Miles 285 rods to the Missouri River, then down said river to place of beginning and containing 300,000 Acres of land, and said boundary line is further described by having mounds erected on the high ground from 89 rods to one mile apart, and so situated as to be visible from one to the other, and sod taken from the outside of said line as completed by me the 27th day of June A.D. 1855." (See Land Division – Ancient and Misc. Surveys, No. Vol. 3.)

The land removed from this reservation and ceded to the Government for the Winnebago Tribe by the Act of March 6, 1865, *supra*, was designated as the northern part of the area, defined by a line drawn from a point on the Missouri River four miles south of the northern boundary thereof due west for a distance of ten miles, then due south for four miles, and then due west to the western edge of the reservation. This left an area extending about fourteen miles north from the southern boundary in the eastern ten miles of the

Omaha Reservation, and about ten miles in the western part of the reservation. The original reservation was further diminished by the purchase under the Act of June 22, 1874, *supra*, by the United States for the Winnebago Tribe. The purchase is described in the deed as:

> "Beginning at a stake on the present boundary line between the Omaha and Winnebago Reservations, where said boundary line touches the Missouri River in the North East corner of Lot Two (2) in Section Twenty four (24) of Township Twenty six (26) North of Range Nine (9) East, in said State of Nebraska, Thence West on the boundary line between the Omaha and Winnebago reservations, a distance of about ten (10) miles to the North West corner of said Omaha reservation, it being the North West corner of Lot Three (3) in, Section Twenty-four (24) Township Twenty six (26) North of Range Seven (7) East; Thence South on the West boundary line of the Omaha reservation, about two miles to the section line between, sections twenty five and thirty six, or to the South West corner of Lot Seven (7) in Section twenty five and North West corner of Lot one (1) in Section thirty six (36) in said Township Twenty six (26) North of Range Seven (7) East; Thence East about ten miles on the Section Line between Section twenty-five and thirty-six in Township 26 North of Range Seven East, between sections 29 and 32, 28 and 33, 27 and 34, 26 and 35, and 25 and 36, in Township 26 North of Range 8

> East, between Sections 30 and 31, 29 and 32, 28 and 33, 27 and 34, 26 and 35, and 25 and 36, to a point where said section line touches the Missouri River, or to the South East corner of Lot 4 in Section Twenty five, Township Twenty Six, North of Range Nine (9) East, Thence in a Northerly direction on the East boundary of said Omaha reservation and along the Missouri River to the place of beginning, containing in the aggregate, Twelve Thousand, Three Hundred and Forty Seven and fifty five Hundredths of an acre, (12,347 55/100) of land, be the same more or less."

This conveyance reduced the proportions of the Omaha Reservation to about 12 miles north from the southern boundary in the eastern ten miles. These two statutory cessions to the use of the Winnebagoes are the only changes effected in the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them.

Allotments

The allotment right of the Omaha Indians to their reservations has been recognized from the time of the first Treaty in 1830, *supra*. Provision was made in that agreement for the allotment of one section to the members of the various tribes which were parties thereto. However, as indicated above, the United States was released from its promises in this Treaty

by that which followed in 1836, *supra*. The Treaty of 1854 also authorized the allotment of members of the Tribe, and though the reservation set aside was never occupied, the allotment provisions in Article 6 continued in force, but unused. The first allotment on the Omaha Reservation was made in 1869, under the stipulations of Article 4 of the Treaty of 1865, *supra*, which provided for the occupation of one hundred and sixty acres by heads of families and forty acres by single males over eighteen years of age. It was later held by the United States Supreme Court, in the case of United States v. Chase (245 U.S. 89) that these allotments were merely assignments individualizing the tribal right of occupancy, not vesting the Indian with any personal rights to the land. This right was terminated by the Act of August 7, 1882, *supra*, which authorized allotments of one-quarter section to each head of a family, one-eighth of a section to each single person over eighteen and to each orphan child under eighteen, and one sixteenth of a section to each other person under the age of eighteen. Section 5

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

ANNUAL REPORT

OF THE

SECRETARY OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1896

IN FIVE VOLUMES.

VOLUME II

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1897.

* * *

[88] EXTENSION OF THE PAYMENTS FOR OMAHA LANDS.

My last annual report stated that the Omaha Indians had refused to grant the extension of time to purchasers of their lands, contemplated by the act of Congress approved August 11, 1894 (28 Stat. L., 276), but that their action was rendered nugatory by an item in the Indian appropriation act for the fiscal year 1896, which granted an extension without any submission of the matter to the Indians for their consent.

The purchasers, however, finding that greater benefit would be derived by them if the Indians would accept the provisions of the act of 1894, requested that it be again submitted to them, and Captain Beck, the acting Indian agent, recommended favorable action on the ground that the Indians had not before properly understood the question. In compliance with Department instructions of November 23, 1895, Captain Beck was directed to present the matter to the Indians, and December 23, 1895, he transmitted a copy of a resolution adopted by the Omahas, assenting to the extension of time, as provided by the act of 1894.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

[135] OMAHA AND WINNEBAGO AGENCY, NEBRASKA
September 18, 1885

SIR: I have the honor to submit this my fourth annual report.

This agency is situated in Nebraska, 25 miles south of Sioux City, Iowa. The reservation is 18 by 25 miles in extent, on the west bank of the Missouri River. This land was reserved by the Omahas when they ceded to the Government what is now the State of Nebraska, and was held by them alone until the Winnebagoes were removed from Minnesota to Crow Creek, Dakota Territory, and from there they drifted, down to the Omahas.

The Government later purchased the north part of the Omaha Reservation for a home for the Winnebagoes. This was not a judicious thing for the Omahas to do, as numerous differences have arisen between them because of the close proximity of the tribes, in most of which the more quiet Omahas were the victims. The most serious of these offenses was the stealing from the Omahas of near 200 ponies by the Winnebagoes. This matter has been investigated, and a bill was before Congress, recommended by the honorable Commissioner of Indian Affairs, to reimburse the Omahas from the Winnebago fund for this loss, but the bill was lost for want of time and has not

been renewed. I earnestly recommend that something be done in this case.

The Omahas have reduced their reservation by selling 50,000 sores, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder. The work of allotting them was so faithfully done by Miss A. C. Fletcher that the Indiana have gone to work is earnest to make them homes on the land which they now believe to be theirs.

More than a year ago the Omahas felt themselves competent to do their own work and attend to their own affairs. At their request all their employés were discharged and they were left to themselves. The result, which then seemed doubtful, has shown the wisdom of their choice. They have attended to their own business and paid for their own work and are more independent and manly than before because of the consciousness that they are becoming men. They purchased eight reapers themselves and saved their 2,000 acres of wheat, doing all the work and making their own plans themselves. They are justly proud of this achievement. I earnestly hope that this spirit of Independence will be fostered in them and they be permitted to attend to their own affairs with an occasional visit from the agent for the purpose of giving them advice and encouragement They are manly men and are going in the right way.

The Omahas have a mission school for girls established many years ago by the Presbyterian

Board of Foreign Missions. It is a very excellent school, and doing a noble work. The ladies in charge are deserving of highest praise for their faithful labors. There is also a Government school in successful operation at the agency, doing good work. The children are taught farm and house work at this school, and are making good progress. One thing is unpleasant about agency schools, and that is about twice a year the brightest and best of the scholars are called for and sent to Carlisle, Hampton, Houghton, Iowa, and Genoa, Nebr.

These Omahas are in a very prosperous and healthy condition, and if left to the kindly direction of my successor, Maj. C. H. Potter, they will soon become prosperous and profitable citizens and members of society.

The Winnebagoes are bright and lively people, capable of much good or great harm. Most of them have taken allotments of land on their reservation, and are living in houses and cultivating their farms. They took their lands fourteen years ago, and the frequent changes by death, migration, &c., make it necessary that their land should be reallotted and the surplus sold to actual settlers.

Small reservations are preferable in every way for the Indians. It tends to break up that demoralizing habit, roaming, and brings them in more direct contact with white people, which is of itself a civilizing influence. If every Indian family had a thrifty white family within half a mile of them the daily

object-lessons would solve the Indian problem quicker than all the theoretic plans of all those philanthropists who worship the Indian at a distance.

[136] The Winnebagoes have a Government school in healthy condition and capable of doing great good, About fifty scholars attend, and they are as teachable and tractable as white children. The scholars cultivated 45 acres of corn and 10 acres of vegetables, and the work was done well. The most valuable part of the education of Indian children is not obtained from books. The Winnebagoes are in a hopeful condition and if they would cease visiting and receiving visitors they would advance rapidly.

Very respectfully, your obedient servant,

GEO. W. WILKINSON,
United Slates Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

---

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

PresB Missionary 4th

Box H, Lttr 207

Omaha Mission, Nebraska January 20, 1885

Dear Dr. Lowie:

Your good letter was received last evening. We were glad to hear from you so fully in reference to our proposed change. In order that you may have a better understanding of the situation of things in general, we have just hurriedly drawn a rough map of the reservation. For a more accurate and complete map of the reserve, I refer you to the one Mrs. Wade left with you. The west end of the reserve extends eight or nine miles west of Bancroft. Each square on the map enclosed represents one square mile of territory. I have located the Mission, the Agency and the probable site of our new house. The latter is about four miles from the Agency and the same from the southern boundary of the Reserve. See letters and "B" on the map. The proposed site is certainly not more than a mile from the center of population by actual settlement at the present time. The South Block end is more thickly peopled than any other section of the Reserve. Wood Creek and the Missouri River, for a few miles from Decatur, are next in settlement, the Middle Blackbird would come next. The larger part of our church are from north of the Middle blackbird although there are not [illegible] some people in the

North Blackbird section as many of the other places mentioned. At present, there are only fourteen families in the Omaha Creek sections and but two families in all the Logan Valley. [illegible] would be about six miles from the geographical center of Reserve, and four miles from the center by [illegible], yet we would be in the present center of the population, and in the most accessible spot in the whole Reserve. It seems to me entirely out of the question for to locate off the Reserve. The nearest place would be just south of the proposed site but that would be about twelve miles from the Mission (by wagon road) and the greater part of the church people. That would be little or no better than Decatur. We would be better to stay where we are than to move off the Reserve at the nearest accessible point. The best way for us now seem to be to get the permission of the secretary to build on the site mentioned above and then as soon as possible get a title for the land by purchase. We have given up all hope of getting a bill through Congress this session. I see no proper reason why we should not secure the land by an act of Congress if it can be done. Doubtless you know more about these things than we do so we leave that with you. We will also leave it in your hands to do as you think best about getting a permit to build on the Reserve. We would like to commence at once to build; for we can get our lumber cheaper in Iowa than Nebraska, and while the river is frozen over we could save $1.50 per load ferriage. We could also get carpenter to do the frame work of the house for about half of the regular cost if done now before the busy season with them. If you

could go to Washington and confer with the proper persons, it might facilitate matters greatly. It seems to be that the proper way would be to get the Agent to call a counsel, get them to sign a petition asking the Secretary to permit us to build on certain lands, and then by the matter before the secretary for his consent. You may know of a shorter and better plan than this. [illegible] wait until we hear further from you. In so far as we have spoken to the Indians, they have all expressed themselves as highly pleased with our plan.

Very truly yours,

John T. Copley

Decatur March 23, 1887

Rev. John Lowie

My Dear Brother:

I have made some inquiry about the town Randolph of which you spoke, and am told it is a "town" on the railroad, lately to build through the western part of the Reserve perhaps has a tavern, saloon, 2 stores, usually the first-buildings, but it might become a good way station, and convenient by rail to Omaha, but from fifteen to 30 miles from the Winnebego Indians and no direct road as far as I know. If a building should be put up off the reserve, I know of no more convenient place than Decatur, but more convenient to the Omahas than the

Winnebegos, but as convenient as the latter as Randolph, and for more or, and much better [illegible] for my family, and school advantages, of which we do not expect to have any at the Winnebegos as we had none at the Omahas except about seven months. But is this the object of sending me to the Winnebegos? I thought it was for their advantage, especially and to do what I could for the Omahas incidentally. Living here, I would be within reach of that portion of the Omahas that do not often attend meetings in the northern part, but further from the Winnebegos. As for them as mission work is concerned, the nearer to them, the better for they will not likely travel to the [illegible], until they are interested in the great question, what must I do to be saved.

As for the sacrifice the Board, our church makes, what is it, a few hundred dollars, and even that may be no sacrifice for the building may be used as long as it is tenable. Surely that is not to be compared to the sacrifice I make in taking my family, especially my children, where they have scarcely any advantages, an education, except from their parents whose hands are already more than full. It does seem to me that some very strong ideas are entertained about Indian Missions, but may be altogether wrong and in the dark.

The Agent has his instructions from McManghan and I was told no letter/[illegible] given him or much satisfaction as the one authorizing the setting a part of a piece of land from a dwelling a chapel from 16 to 166 acres. The smaller amount is enough. He wants

[illegible] see a chapel and bell as both Agencies, independent of the schools.

I learned last [illegible] that he has appointed a Methodist clergy man as superintendent of the school at Omaha Agency. This will [illegible] their religious instruction.

Understand also that now he expects me to move there as soon as a house can be put up. This is like in March (23) and the snow is still here, no meeting to speak of, except a tribe yesterday when the wind which had been from the north in a week got to the south, but is again in the north. When the snow comes, we look in from floods, and from [illegible] impassible roads. The past winter exceeds that of 56-57 [illegible]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

50TH CONGRESS. } SENATE. { Ex. Doc.
1st Session. } { No. 77.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING,

In response to Senate resolution of January 31, 1888, information relative to sale of lands in the Omaha Reservation.

FEBRUARY 14, 1858. – Ordered to be printed and referred to the Committee on Public Lands.

DEPARTMENT OF THE INTERIOR,
Washington, February 10, 1888.

SIR: I have the honor to acknowledge the receipt of Senate resolution of January 31, 1888, as follows:

Resolved, That the Secretary of the Interior be directed to report to the Senate what amount of lands upon the Omaha Reservation have been sold pursuant to the statute approved August 17, 1882, and the statutes amendatory thereof; how much of the money due as proceeds of such sales has been paid into the Treasury, and how much, if any is due and unpaid, both principal and interest, and what steps, if any,

have been taken to enforce such payments as are due, or to recover possession of lands so sold, payments for which have failed according to the terms thereof.

In response thereto I inclose herewith copy of report from the Acting Commissioner of the General Land Office, dated the 9th instant, with the information called for by the resolution.

Very respectfully,

H. L. MULDROW,
Acting Secretary.

The PRESIDENT OF THE SENATE PRO TEMPORE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 9, 1888.

SIR: I have the honor to acknowledge the receipt, by reference from Hon. D. L. Hawkins, Assistant Secretary, under date of February 1, 1888, of Senate resolution of January 31, 1888, calling for information as to what amount of lands upon the Omaha Reservation (in Nebraska) have been sold pursuant to the statute approved August 17, 1882, and the statutes amendatory thereof; how much of the money due as proceeds of such sales has been paid into the Treasury, and how much, if any, is due and unpaid, both principal and interest, and what steps, if any, have been taken to enforce such payments as are due, or to recover possession of the

lands so sold payments for which have failed according to the terms thereof.

In accordance with directions given by the Assistant Secretary the following report is submitted in relation to the sales of said lands, under the abovementioned act and those amendatory thereof, as shown by the records of this office, to wit:

First. Amount of lands sold up to and including December 31, 1887, 49,630.59 acres.

Second. Amount of money paid into the Treasury on account of such sales from the date of first payment to December 31, 1887, $154,654.62.

Third. Amount of interest due and unpaid up to December 31, 1887, $4,108.06.

By the act of Congress approved August 2, 1886, the Secretary of the Interior was authorized to extend the time of payment to purchasers of lands of the Omaha Indians "two years from June 29, 1886, who had filed by November 30, 1884, making the first payment due June 29, 1888, the interest due on said payments to be paid annually at the time said payments are now due." Parties who had filed since November 30, 1884, and prior to August 2, 1886, are not required to make first payment until August 2, 1888, but the interest must be paid annually on August 2. Thus it will be observed that no principal is due until June 29, 1888, or August 2, 1888.

No steps have been taken to enforce payments (interest) due, or to recover possession of lands sold,

payments for which have failed according to the terms of the statute.

The inclosures received are herewith returned.

Very respectfully,

S. M. STOCKSLAGER,
Acting Commissioner.

Hon. WM. F. VILAS,
Secretary of the Interior.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

55TH CONGRESS. } HOUSE OF { DOCUMENT
2nd Session. } REPRESENTATIVES. { No. 5.

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1897.

REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS.

LIBRARY OF
Southern Methodist University
DALLAS, TEXAS

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1897.

* * *

[178] REPORTS OF AGENTS IN NEBRASKA.

REPORT OF OMAHA AND WINNEBAGO AGENCY.

OMAHA AND WINNEBAGO AGENCY, NEBR., *August 24, 1897.*

SIR: In compliance with instructions contained in your letter of June 1, 1897, I have the honor to

submit herewith the following report of the affairs of this agency, together with required statistics.

Having taken charge of the agency on June 20, 1897, I have not had time to familiarize myself with the needs of the Indians or the condition of affairs here to the extent that I am ready to make any recommendations or suggestions, but will make special reports from time to time, as I become familiar with the needs of the agency.

Location of agency, area, timber, water, and character of soil. – The Omaha and Winnebago reservations are located in the northeastern part of Nebraska, and embrace all of Thurston County, except a portion of the reservation which has been sold and is now occupied by the white purchasers. They are bounded on the east by the Missouri River, 18 miles from northern to southern limits, and extend west 30 miles, embracing one of the finest tracts of agricultural and grazing land in the State. The eastern portion is fairly well timbered with valuable varieties of hard woods native to this section. The central and western portions are made up of gently rolling prairies, wide and fertile valleys, well watered by the Logan, Omaha, and Blackbird creeks and their branches, and possessed of the finest soil. The Winnebago tribe of Indians occupy the northern portion, containing about 11,000 acres, and the Omaha tribe the southern, containing about 133,000 acres.

WINNEBAGOES.

Census. – The population of the Winnebago tribe, according to the census prepared recently, is as follows:

Total population	1,153
Males	583
Females	570
Males over 18	372
Females above 14	389
Children between 6 and 16	238

Education. – The Winnebago Boarding School has been well managed during the past year and the results from the year's work have been gratifying. A good general average has been maintained throughout the year, with an enrollment of 111 at the close of school.

These Indians, like all others, greatly prefer to send their children to the agency rather than to nonreservation schools.

There are five district day schools on the reservation, two of which have had contracts with the Government for the instruction of Indian pupils. General satisfaction seems to have been given by these schools, some of the Indians preferring to send their children to the day schools rather than to the Government boarding school.

Farming. – There has been a slight increase over last year in the breaking up of lands, but some of those cultivated by Indians last year were leased this

season. A large acreage was planted this year, but it is reported by the Government farmer that owing to unfavorable weather in the spring the yield of small grain is light; the corn is looking very fine, but there is still some danger from frost. A number of Indians have recently signified their willingness to farm if they could be assisted by the Government in the way of good horses and the use of farm implements. Most of the farm machinery issued to them a year or two ago is unfit for service, and they are particularly in need of mowing machines. The few serviceable machines at the agency are now in constant use during the haying season, and many neglect to provide enough hay for their stock through the winter for the reason that they have no machines of their own and are unable to borrow the Government machines at the proper season.

Leases. – There are about 375 approved leases of allotted lands on the Winnebago Reservation in force, while many more white renters are actually occupying lands without approved leases. Nearly all the Winnebago Indians have their allotments, or at least a portion of their land, leased to white settlers. There are also 30 leases of tribal lands on this reservation in force.

[179] **Morals and crimes, marriage**. – There is a marked public sentiment against the looseness of the marital relations of the Winnebagoes. The practice of assuming and dissolving the marriage relation at will, without form of law, is common. It has been the custom of these people from the earliest history,

and is a vice difficult to remedy. Outside of the moral question, it will necessarily cause these people an endless amount of trouble in the future as regards the law of descent and in determining the legal heirs to property.

Allotments. – The manner in which. the allotments to the Winnebagoes were made, namely, 160 acres to the husband and nothing to the wife, has been and will continue to be a source of great trouble. Thus, a woman who happened to be encumbered with a husband at the time the allotments were made, obtained no land in her own name. The law, I presume, intended the 160 acres for the husband and wife for a home; but as soon as the Indian becomes tired of his wife he leaves her, which constitutes an Indian divorce without further ceremony, and the deserted wife remains without land or means of supporting herself and children.

Sanitary condition. – The physician for the Winnebagoes, Dr. W. J. Stephenson, was transferred to this agency in May last and does not feel sufficiently familiar with the conditions which have existed previous to his arrival to report at any treat length. He reports, briefly, as follows:

> Since arriving at the reservation in May, 1897, I have visited Indians at their homes and rendered service to others at my office. The prevailing disease is tuberculosis, which is slowly but surely solving the Indian problem. With the exception of chronic troubles, a few cases of malarial fever, and the usual

bowel troubles attendant upon the hot weather of summer, these Indians have enjoyed comparatively good health since my arrival in May last. There was an epidemic of measles last winter, and several deaths occurred from the disease itself and complications. At the present time the sanitary condition of the Indians is good.

The system now in vogue of leasing an Indian's entire allotment, including in many cases his comfortable house, erected at Government expense, deprives him of the use of the house in winter, and for this reason many Indians who have houses on their allotments do not occupy them, but live in tepees or huts. This condition of things may not be detrimental to their health in summer, but it is certainly not a good state of affairs for winter. With two or three families crowded into a hut or tepee 10 by 12 feet in size, where no ventilation whatever is provided and the impure air is breathed over day after day, there is every opportunity for disease to originate and spread, while it can not be successfully combatted under those conditions.

OMAHAS.

Census. – The population of the Omaha tribe, according to the census recently. completed, is as follows:

Total population	1,170
Males	590
Females	580
Males over 18	290
Females above 14	336
Children between 6 and 16	227

Education. – The Omaha Boarding School has been satisfactorily conducted during the past fiscal year, with an average attendance of 87. The capacity of the school is about 85. There is urgent need of a steam heating plant, in place of the wood stoves now in use, the present arrangement being dangerous and unsatisfactory. A new dormitory for the school, to enlarge the capacity to meet the increasing enrollment, is a necessity, and this matter will be taken up in a special report as soon as practicable. Report of the superintendent of the school is transmitted herewith.

There are three district day schools on the reservation of which two have had contracts with the Indian Office for the instruction of Indian pupils during the last year. So far as I am able to learn, they have given good satisfaction.

Farming. – The Omahas have not increased largely the area of their farm holdings themselves; they find it easier to obtain money by leasing their lands. The majority do not seek to farm further than that which is absolutely necessary. There are some good farmers among them, but they are the exception and not the rule: Nearly all have houses, plant a small piece of ground, principally to corn, and raise a

few vegetables, barely sufficient, however, to keep them through the winter.

Leases. – Nearly all the Omahas have leased their lands under Department regulations. A great many of the leases, however, remain in this office incomplete, having been held here by my predecessor, awaiting the action of Congress on the subject of leasing, or for other reasons.

Crime, morals, marriage. – The Omahas respect the marriage relation, and family ties are recognized. There are still a few polygamous marriages, but this evil practice is gradually dying out.

[180] GENERAL REMARKS ON BOTH RESERVATIONS.

Field matrons. – The work of the field matron on the Omaha Reservation has been satisfactory during the year. A summary of her work shows that one hundred and twenty-five days have been devoted to visiting 186 Indian familes at their homes: giving general instruction to all visited in the manner of preparing food and cleanliness; special instruction to 56 in the cutting and making of garments; and that medicine was given to about 100, and special instruction given to 50 mothers in the care of sick babies and children. Her home is always open to young people for singing and. social gatherings, and her aid is also cheerfully furnished and encouragement given in work of Christian Endeavor and temperance societies.

A field matron has also been appointed recently for the Winnebago Reservation; and it is believed that much good will result from faithful work in this direction.

Liquor traffic. – The sale of intoxicating liquor to Indians of this agency, which has, in spite of the efforts of the agent, been carried on openly by saloon keepers in adjoining towns and even extended to the reservations by the "bootleggers," will be noticeably checked in the near future as soon as the grand jury meets and suitable punishment is inflicted on a number of the offenders who have already been arrested. The act of Congress approved January 30, 1897, provides a suitable punishment for the introduction of liquor into the Indian country or sale to Indians, and a vigorous campaign has been commenced against offenders and will be continued until a proper respect for the law is shown. Heretofore it has been impossible to inflict proper punishment for this offense, owing to the lack of suitable legislation on the subject.

Indian freighters. – The Indians are good freighters; they keep their loads dry and open no packages. During the past year they transported with their own teams all the goods and supplies furnished under Government contract for the agency and schools.

Indian police. – The United States Indian police force of this agency consists of 1 officer and 16 privates. They furnish their own horses, and have

performed commendable service in the suppression of the liquor traffic, guarding of warehouses and agency buildings, returning runaway pupils to the schools, etc.

Missionary work. – All the missionary work of this agency is conducted by the Presbyterian Board of Missions. They have comfortable buildings and services are held regularly. The Winnebagoes are not a religiously inclined people and the attendance at Winnebago Reservation is small. On the Omaha Reservation they have a church organization and the meetings are fairly well attended.

For further report I respectfully refer to the inclosed statistics.

Very respectfully,

W. A. MERCER,
Captain, Eighth Infantry, Acting Indian Agent.

The COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SUPERINTENDENT OF OMAHA SCHOOL.

OMAHA INDUSTRIAL BOARDING SCHOOL,
Omaha and Winnebago Agency, Nebr., July 24, 1897.

SIR: I have the honor to submit my second annual report of the Omaha school for the fiscal year ended June 30, 1897.

This school has been very prosperous during the year. The attendance, which was constant with but few exceptions and these for good reasons, was as

follows: First quarter, 72; second quarter, 93; third quarter, 91; fourth quarter, 95. Runaways were very infrequent and the improvement in the general discipline of the school has been marked. The services of the Omaha police were very creditable and exceedingly helpful in many ways.

The visiting of the pupils by their parents has been regulated, and law and order, with a wholesome respect for authority, have been inculcated.

The improvements in the plant have not been extensive, but they have been of a very substantial character and have added much to the appearance of the plant and to its effective workings. They are as follows, viz: Oil house, 10 by 10 feet, brick, cement floor; outhouse (employees') 6 by 8 feet, brick, draw tank: outhouse (boys') 6 by 12 feet, brick, draw tank. A cement floor was put in the basement of the main building. One hundred and fifty square yards of cement walk was made. The interior of the schoolrooms was put in excellent condition. In no main building badly worn floors were replaced by new ones and the entire building was thoroughly renovated.

Twelve rods of board walk was laid; 60 rods of board fence was built and painted; 250 rods of wire fence was built. A natural water course, which caused much trouble after heavy rains, was changed in its course by a ditch. Considerable grading has been done on the yards.

The water system has been improved. A John base heater and boiler were purchased and a "ring

system" of baths located in the basement of the main building.

A piano was purchased for the school during the year. Some of the pupils have made marked progress in music, and the instrument has been a source of much gratification to the entire school. A sitting room has been provided for employees and their guests. This has been neatly furnished

* * *

56TH CONGRESS. *1st Session.* } HOUSE OF REPRESENTATIVES, { DOCUMENT No. 5.

ANNUAL REPORTS

OF THE

DEPARTMENT OF THE INTERIOR

FOR THE

FISCAL YEAR ENDED JUNE 30, 1899.

INDIAN AFFAIRS.
PART I.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1899.

[231] REPORTS CONCERNING INDIANS IN NEBRASKA.

REPORT OF AGENT FOR THE OMAHA AND WINNEBAGO AGENCY.

WINNEBAGO, NEBR., *August 31, 1899.*

SIR: In compliance with instructions contained in your circular letter of May 1, I have the honor to submit herewith my first annual report of the affairs of this agency for the fiscal year ending June 80, 1899.

I assumed charge at this agency February 6 last, relieving Capt. W. A. Mercer, of whom I desire to express my high regard and acknowledge many kindly acts and valuable assistance rendered me in assuming the duties of this position.

Reservation. – This reservation is located in the northeastern portion of Nebraska, having an east front on the Missouri River of 18 miles and extending west 30 miles, embracing about 250,000 acres.

The eastern portion bordering on the Missouri River is quite broken, but sufficiently well timbered to afford an ample fuel supply for the entire reservation. The central and western portions are made up of gently rolling prairies and wide valleys well watered by the Logan, Omaha, and Blackbird creeks and their numerous branches, and the soil of the entire tract is the most fertile and productive. Located as this reservation is, in the central corn belt of the West, with good railway facilities, it is, without doubt, one

of the most desirable tracts of agricultural land in the State.

The Winnebago Indians occupy the northern portion of this reservation, embracing about 110,000 acres. This originally was a part of the Omaha Reservation and was purchased of that tribe in 1864, the first selection of a reservation for the Winnebagoes in South Dakota, under the provisions of the act of February 21, 1862, not proving satisfactory. The southern portion of the reservation, containing about 140,000 acres, is occupied by the Omahas. There is little in common between the Omaha and Winnebago Indians – speaking a different language and unlike in character and habits. This immediate vicinity has been the home of the Omahas since the earliest history of the Missouri Valley, while the Winnebagoes are comparatively new to this locality.

WINNEBAGOES.

Little marked change in the condition of the Winnebagoes can be reported for the past year. The ever-increasing revenue derived from the leasing of their allotments enables them to live more comfortably; they are better clothed and fed; have better horses and more carriages; in fact, the large proportion of them have everything necessary to their comfort. They are enabled to obtain all the necessities and many of the luxuries that go with a civilized life. Doubtless all this comes too easy, and if more personal

effort was required of them their development toward a better civilization would be more rapid.

Progress in some directions we can note, as in the growing appreciation of the value of property, as illustrated in the energy they display in proving heirship to deceased allottees' land. Also their respect for law is one of the most noteworthy signs of improvement. Few communities will you find where the rights of private property are better respected, and but one arrest has been made during the year for any crime except as to violation of liquor laws, and even in this respect there has been a marked improvement.

Census. – The population of the Winnebago tribe is as follows:

Total population	1,129
Males	595
Females	534
Males over 18	372
Females above 14	398
School children between 6 and 18	277

A comparison of the census returns of 1869 shows a decrease of about 200 in thirty years, but this is somewhat misleading, as quite a number have been transferred during this period from the roll of the Wisconsin branch of the tribe, so that a conservative estimate would place this decrease at something over 20 per cent in thirty years.

Allotments. – The original allotment to the Winnebagoes was made under the act of 1868, and

487 patents were issued. In 1887 a new allotment was ordered under the act of that year. Investigation developed the fact that only about one-half of the original allottees could be found or indentified. This was owing to the fact that English names were arbitrarily given them at the time of the first allotment and the failure to retain the Indian names also. As a result the allotting agent returned over [232] 200 patents which had been recovered and which, were finally canceled by the Department as being fictitious. As a result of this confusion something over 250 allottees have thus far failed to receive their allotments in whole or in part.

This condition has caused much feeling and discontent, but I am pleased to say that Special Agent John K. Rankin is now on the reservation with full instructions from the Department to adjust all errors and omissions and to complete the allotment.

Aiding allottees. – Since the Winnebagoes have occupied this reservation 130 houses have been erected for them by the Government. Many of these houses were built some thirty years ago, and although they have been repaired from time to time, yet now many of them are badly in need of repairs to render them comfortable. In the appropriation for Winnebagoes for the current year is the item of $3,917.02 to be expended under the direction of the Secretary of the Interior "for the erection of houses, improvements of their allotments of land, purchase of stock, agriculture implements, seeds, and other beneficial objects." If a portion of the above-mentioned

appropriation is available I would earnestly recommend that it be expended in making the much-needed repairs on houses as indicated.

Education. – The destruction of the Winnebago school plant by fire in April, 1898 was a serious blow to the Winnebago Indians, and the end of the year finds the tribe in a deplorable state as to the education of their children. The majority of these children remained at their homes during the year, for the most part in comparative idleness. A number, however, attended public district schools with which the Indian Office had contracts. These were mostly mixed bloods, and quite satisfactory progress was made at some of these schools by the Indian children.

Contracts were made with three public school districts on the Winnebago Reservation. The new regulation which applies to these contracts in the future will, without doubt, render these schools more effective to the real-Indian. Nonreservation schools were attended by the usual number of pupils from the Winnebagoes.

We understand that plans are approved for a new school plant, and the more progressive Indians and this office will be pleased when further steps are taken by the Department to construct the same. Since means are provided whereby children of school age on a reservation can be placed in the reservation school without the consent of parents, the pressing need of the Winnebagoes is a well-equipped school put in operation at the earliest possible moment.

Missionary work. – The Presbyterian Board of Missions has a comfortable church, a resident missionary, and, services are held regularly. The attendance by the Indians is small, but when the Winnebago boarding school is in session, the Sunday school connected with the church has a large attendance, and much good is doubtless accomplished. The Winnebagoes do not respond kindly to missionary efforts, and encouragement in this direction is small.

Sanitary conditions. – The sanitary condition during the year has been fairly good The number of deaths is quite large, but the majority of these have been old people The prevailing disease is tuberculosis, which is the great scourge of this people.

The sanitary report for this year will necessarily be rather abbreviated, owing to the fact that the physician who has been here during the year has just been transferred and his successor has not been here long enough to become acquainted with the facts.

Agency building. – The agency buildings are quite old, most of them having been erected thirty-three years ago. With the repairs now allowed, together with the new cottage under contract, they will be in a fairly comfortable condition.

The water supply continues to be a vexatious question at this agency. The agents dwelling and three of the employees' are unprovided for. Their entire supply has now to be hauled by team. I am at a loss to know what to recommend in this

particular, as attempts in the past to obtain a supply at two of these houses have proven failures.

Agency shops. – Good work has been done at both the carpenter and blacksmith shops during the year, and, while we are not able to do all the work presented, ye [illegible] the more important, as repairs for wagons, farm machinery, and horseshoeing, is well kept up.

OMAHAS.

Until the law allowing and regulating. the leasing of the individual allotments was passed, the duties of the agent as regards the Omahas was only nominal, but at this date the amount of work involved in attending to the affairs of the Omahas is little if any less than that in attending to the Winnebagoes. A full appreciation, of this fact will give your office a correct idea of the increased work and financial responsibility connected with this agency.

Quite a marked advance has been made by the Omahas during the year. They are more industrious, are doing better farming, building houses, have more stock – in short, the outlook for them is very encouraging.

[233] **Census**. – The population of the Omaha tribe is as follows:

Total population	1,157
Males	574
Females	583

Males over 18	284
Females over 14	335
School children between 6 and 18	282

A comparison of the census returns of 1869 shows an increase of 137 in the Omaha tribe of Indians, or about 12 per cent during the period of the last thirty years.

Agency. – All the business connected with the Omahas is transacted at their old agency, located 10 miles from this office. One day each week is devoted entirely to drawing Omaha leases and paying out their individual moneys. This plan I instituted on assuming charge at this agency, and it has proved very gratifying to the Omahas. It saves them much travel, but yet more important to them, it satisfies their pride in having their business done at home, and not being compelled to visit the agency on a neighboring reservation.

Allotments. – All allotments to the Omahas have been made under special acts, and, up to this date, 954 patents have been issued covering 77,786 acres, leaving a residue of 64,558 acres not yet allotted. Provision to allot this remainder was made by the act of March 3, 1893. No action, however, to carry into effect this law was taken until the present year; but on the 24th of April Special Agent John K. Rankin was designated to proceed to the agency and complete the allotment as provided by law, and he is now engaged in this work. Dissatisfaction is expressed by some at the provision of the law which will exclude

from participating in the allotment children born since March 3, 1893; yet, as a whole, it will be satisfactory and will about exhaust the land remaining available for allotment. When this work is completed, it will remove the cause of much discontent which is existing among the Omahas.

Missionary work. – The Presbyterian Board of Missions have two church buildings and one resident missionary. There is a very good attendance upon church services and over 40 communicants, so that the field is encouraging for effort in this direction.

Education. – The Omaha boarding school (buildings owned and school supported by the Government) is a very flourishing institution. The buildings are of wood, but most of them are in good repair. Superintendent, teachers, and other employees are efficient and attentive to their duties. The Omahas take pride in their school, and, as a consequence, we have little difficulty in keeping the attendance up to the full capacity. Detailed estimates have been made out for much-needed improvements, and I earnestly recommend that, when funds are available, the estimates be allowed. I inclose herewith report of Superintendent Ratliff, which will give the conditions at this school more in detail.

In addition to the Omaha boarding school, contracts have been made with five district schools to educate Indian children. In a number of districts this plan has proved satisfactory, and the districts that are able to comply with the instructions from your

office for the current year will, I am sure, offer good school advantages for the Indians attending these schools.

Sanitary. – We have no agency physician at the Omahas, therefore this report can not be as full as desirable. During the winter a very severe epidemic of measles visited the Omaha tribe. This disease has always proved very fatal with the Omahas, but this has been especially true the past winter. Over 50 deaths are from this cause alone. Special authority was granted me by your office and medical attendance provided during this epidemic. With the above noted exception the health of the Omaha tribe has been good.

Agency shops. – The only Government employees at the Omaha Agency are the carpenter and blacksmith, and a good repair shop is maintained. I consider this shop of great value to the Omahas. If it were not maintained, they would be obliged to take their work to distant towns. They are not always provided with the means to pay, and as a consequence often their farm work would suffer. The work done in the shop is charged to the individual Indians, and collected by this office when the per capita annuity is paid. This renders the shop nearly self-supporting.

AGRICULTURE.

The accompanying statistics in regard to the agricultural products of the Omaha and Winnebago Indians have been carefully prepared by the farmers,

and as the thrashing of the small grain is about completed and corn so far advanced, those estimates are doubtless quite accurate. From a comparison with the last year we can note some improvement. The cultivated area has not been largely increased. In a few instances allottees have cultivated their land, which previously had been leased.

[234] The season has been favorable for corn. That which was planted in time and has been well cultivated is a fine crop. The late planted and poorly attended is a partial failure. The wheat yield is below the average and the quality not first class. The only seed issued to the Indians of this reservation was issued to the Winnebagoes during the present season, namely, 500 bushels of potatoes, which I am pleased to say were generally planted. The season has been favorable and a very good crop secured.

Hay is a good crop, and at this date is being secured; but, owing to a scarcity of serviceable machines, it will be late before the harvest is completed. In this connection I would say that most of the mowing machines provided years ago for the Winnebagoes are now worn out and worthless, and some provision will have to be made for a new supply before another season.

CRIMES.

The crimes committed on the reservations during the past year have been few and of a minor nature; in fact, nothing worthy of note, except the one offense of

introducing liquor upon the reservation, for which 56 Indians and 100 whites have been prosecuted. The United States court officials have been very active in suppressing this evil, and I am pleased to note the marked improvement in the conditions in this respect. Our police force have cooperated with the court and obtained the evidence necessary to secure the conviction. Some of the most incorrigible of the offenders have been imprisoned one hundred and fifty days, and have paid fines of from $25 to $50. A continuance of this vigorous policy will reduce this evil to a minimum.

ROAD MAKING AND REPAIRS.

The Indians are required by the State law to work out their poll tax or pay in cash. Most of them prefer the former course, which furnishes sufficient labor to keep the roads, with the exception of the bridges, in fairly good repair. Many of the roads on the reservation are not properly located, but steps are now being taken for this office to act in concert with the county authorities, and we hope that by another year much improvement will be made in this respect.

LEASING.

This is by far the most perplexing proposition, as well as involving the most labor of anything connected with the administration of affairs at this agency. To illustrate as to the detail work involved, we have now in force over 1,300 leases, all of which are drawn

in this office. Each requires careful investigation, and numerous books must be kept to make a complete record. Then the 1,300 leases require that 2,600 collections be made and receipts issued; and, as over 1,100 are leases on allotted lands, the money for which, after collecting, must be paid out to the individual Indian the receipts, taken in triplicate, will number over 6,500. In fact, since the regulation requiring the individual Indian lease moneys to be paid into this office went into effect, it has increased the clerical work at least 100 per cent.

Again, we have had during the past year over one hundred cases of dispute heirship, each of which had to be carefully investigated before a lease was made or the money paid out. These questions are not often a matter of law, but of fact. The marriage relations of these people have been so lax that it was often very difficult to trace the descent of property.

The regulation requiring all individual moneys to be paid into this office has added very largely to the revenues of these people. A conservative estimate would place the increase at not less than 40 per cent. The reason for this is that an Indian will discount a payment due in six months or one year or two years hence to almost any amount which the white renter has the conscience to take, and by far too many of the lessees have taken advantage of this fact.

It is also very difficult to determine who should be allowed to lease, and if so what proportion of their land. Few, if any, are able to cultivate all of their allotment. Then we have the old men, the women, and children, most of whom have allotments, besides the vast amount of land descended to them by inheritance. None of this class can cultivate their lands, so that, by a strict compliance with the law in regard to leasing, we will yet have a very large proportion of the reservation to lease.

The rental values are constantly increasing, so that the future support of the people in comfort is secured, if only the young men could be induced to take [illegible] farming for a livelihood. They have the best of land, but they lack means for start.

[235] I would most earnestly recommend, if it is found possible, that some steps be taken so that the rentals of the allotted lands of minors be retained by the Government to accumulate until they are of age, and in the case of males, be then invested in establishing them on their allotments, purchasing the necessary farming machinery, etc. At present the parents or guardians use these rentals. Most of the children are at school and the money is not required for their support. If the course suggested were pursued, the young man returning from an Eastern school would be provided with the means for a start in life.

INDIAN POLICE.

Our force consists of one officer and sixteen privates. They have been quite efficient in the discharge of their duties, and especially active in detecting and securing the arrest of violators of the liquor law.

EMPLOYEES.

All of my employees have been faithful and efficient, and fully employed. The clerical force has been overworked; but, with the additional force allowed by the Department, we now have the work well in hand.

FIELD MATRONS.

Field matrons are employed by the Department for both the Omaha and Winnebago tribes. The employee for the Winnebagoes resides at this agency, so that I am able to speak of the character of the work performed from personal observation, and I am pleased to report that excellent service has been given. The Omaha field matron resides 11 miles from the agency, and not on my regular line of travel when visiting the Omahas, but from what I have seen I think valuable service is being rendered.

In closing I desire to express my appreciation of the uniform courtesy and support extended to me by your office.

For further report I respectfully refer to the inclosed statistics.

Very respectfully,

CHAS. P. MATHEWSON,
United States Indian Agent.

THE COMMISSIONER OF INDIAN AFFAIRS.

REPORT OF SUPERINTENDENT OF OMAHA SCHOOL.

OMAHA AND WINNEBAGO AGENCY, NEBR.,
August 30, 1899.

SIR: I have the honor to submit my first annual report of the Omaha boarding school for the fiscal year, ended June 30, 1899:

I reported here for duty on September 7, 1898. School began September 12, 1898, and closed June 21, 1899 – forty weeks and three days.

It was not my good fortune to meet the former superintendent, D. D. McArthur, here before he left, and get his plans. But I wish to say that I have found abundant evidence of careful and thoughtful work on his part. Many things here were in good condition, and most of what I would say are needed improvements had been studied through and careful plans and specifications for the same had been left on file.

So many changes in the employee force had been made that the work in the beginning necessarily suffered somewhat while we were getting acquainted

with the new field. But it seems to me that on the whole, this school has an exceptionally faithful, earnest, and efficient set of employees, and in course of the year a large amount of hard and faithful work has been done. In this respect the climax came when the epidemic of measles was on, as my special report on that situation mentioned. Fifty-one of the 80 pupils then in school had the measles.

A number of minor improvements have been made: A new windmill and pump purchased; one new horse for the driving team; a set of new driving harness; about 1½ miles fence repaired and improved; the pasture water tank covered, so that with the mercury 36° below zero the water did not freeze badly (this was the farmer's idea); a brick ash house built, as a little further precaution against fire; new porches built next to the play rooms, which add materially to the comfort there, and a set of twenty band instruments purchased. We hope, in course of a year or so, to have a good Omaha band.

A number of more extensive improvements are very much needed, plans and specifications for which are now on file in the Indian Office. Especially as a further protection against fire, as well as for economy and convenience, the laundry should be moved farther away from the main building and enlarged; the woodhouse should be moved; a hot water heating plant put in; also a gasoline lighting plant and water system with hose, hydrants, and pressure sufficient to furnish adequate protection against fire. The barn and other stock buildings are badly in need of being

moved and repaired, as per specifications already sent in.

The school has 20 acres of good corn, 20 acres of good millet, about 20 acres of oats, which was fair, and several acres of good potatoes. This season we are experimenting in a small way with sugar beets intended for cattle feed. The garden has done well. The chief objection to a garden here is that such a large part of its products reach their season in July and August, when the pupils are at home.

No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX, VOLUME V

JAMES D. SMITH
Solicitor General
of Nebraska
OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov
Counsel of Record
for Petitioners

DONALD B. VERRILLI, JR.
Solicitor General
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov
Counsel of Record for
Respondent United States

PAUL D. CLEMENT
BANCROFT PLLC
500 New Jersey Avenue, N.W.,
Seventh Floor
Washington, D.C. 20001
(202) 234-0090
pclement@bancroftpllc.com
Counsel of Record for
Tribal Respondents

Petition For Certiorari Filed May 27, 2015
Certiorari Granted October 1, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

VOLUME V

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1880, filed July 12, 2013 1118

Excerpts from the Annual Report of the Commissioner of Indian Affairs for the Year 1881, filed July 12, 2013 1120

Legislative Resolution 37, 80th Neb. Leg. (1969), filed July 12, 2013 1122

35 FR 16598 (1970), filed July 12, 2013 1125

Excerpts from the Thurston County, Nebraska Website dated May 28, 2012, filed July 12, 2013 ... 1127

Diagram Showing the Township Lines, Guide Meridian, 6th Standard Parallel and the Boundary Lines of the Omaha and Winnebago Ind. Res. in Nebraska, dated January 31, 1884, filed July 12, 2013 1129

Bureau of Indian Affairs Map of Omaha Reservation dated August 3, 1994, filed July 12, 2013 1130

Memorandum from Cora L. Jones, Area Director, Aberdeen Area, to Superintendent of the Winnebago Agency dated August 13, 1999, filed July 12, 2013 1131

Bureau of Indian Affairs Map of Omaha Reservation, dated March 28, 1999, filed July 12, 2013 1133

TABLE OF CONTENTS – Continued

Page

Bureau of Indian Affairs Map of Winnebago and Omaha Reservations, dated May 16, 2000, filed July 12, 2013 1134

Letter from Robert A. LaMacchia, Chief of the Geography Division of the U.S. Census Bureau, to Teri D. Lamplot, Chair of the Board of County Supervisors, dated May 8, 2007, filed July 12, 2013 1135

U.S. Census Bureau Maps of Pender Village for the Year 2000 Census, filed July 12, 2013 1137

Letter from Robert A. LaMacchia, Chief of the Geography Division of the U.S. Census Bureau, to Teri D. Lamplot, Chair of the Board of County Supervisors, dated May 8, 2007, filed July 12, 2013 1139

Nebraska Revenue Ruling 99-92-1 dated March 6, 1992, filed July 12, 2013 1141

Letter from Janet A. Lake, Administrator of the Nebraska Department of Revenue Motor Fuels Division, to Benjamin W. Thompson dated September 22, 2005, filed July 12, 2013..... 1145

Agreement for the Collection and Dissemination of Motor Fuel Taxes Between the State of Nebraska and the Omaha Tribe of Nebraska, filed July 12, 2013 1146

Declaration of Maurice R. Johnson, filed July 12, 2013 1159

Declaration of Amen Sheridan, filed July 12, 2013.... 1162

TABLE OF CONTENTS – Continued

Page

Consent Agreement and Final Order In the Matter of Krusemark Ag, Inc., U.S. Environmental Protection Agency, dated December 1, 2009, filed July 12, 2013 1165

U.S. Environmental Protection Agency Fact Sheet Regarding Discharge Permits for Concentrated Animal Feeding Operations in the Omaha and Winnebago Reservations, dated December 2007, filed July 12, 2013 1174

Map from the Winnebago Agency, filed July 12, 2013 1178

Declaration of Thomas Saunsoci, filed July 12, 2013 1179

Opinion of Marcia M. Kimball, Bureau of Indian Affairs, dated June 27, 1989, filed July 12, 2013 1182

Opinion of Priscilla Wilfahrt, Bureau of Indian Affairs, dated April 24, 2008, filed July 12, 2013 1195

Memorandum from Patrice H. Kunseh, Deputy Solicitor of Indian Affairs, to Priscilla Wilfahrt, Field Solicitor, dated April 16, 2012, filed July 12, 2013 1250

Rebuttal Expert Report submitted by R. David Edmunds, Ph. D., filed July 12, 2013 1251

Index of Evidence in Support of Motion of State of Nebraska for Leave to File Additional Evidence, filed July 23, 2013 1295

TABLE OF CONTENTS – Continued

Page

1883 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1298

1888 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1299

1892 Bureau of Indian Affairs Map Showing Indian Reservations within the Limits of the United States, filed July 23, 2013 1300

1886 Map of Nebraska Published by the Burlington Route, filed July 23, 2013 1301

1889 Railway Map of Nebraska Issued by the State Board of Transportation, filed July 23, 2013 1302

1908 Outline Map of Cuming County from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1303

1908 Outline Map of Grant Township from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1304

1908 Outline Map of Bancroft Township from the Standard Atlas of Cuming County, Nebraska, filed July 23, 2013 1305

TABLE OF CONTENTS – Continued

Page

1885 Map of Omaha and Winnebago Reservation Lands, from the Official State Atlas of Nebraska. Compiled from Government Surveys, County Records, and Personal Investigations, filed July 23, 2013 1306

S. 1255, H. Rep. No. 1530, 47th Cong., 1st Sess. April 27, 1882, filed July 8, 2014 1307

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

ANNUAL REPORT

COMMISSIONER OF INDIAN AFFAIRS

SECRETARY OF THE INTERIOR

THE YEAR 1880.

WASHINGTON
GOVERNMENT PRINTING OFFICE
1880.

* * *

[232] *Schedule showing the names of Indian reservations in the United States, agencies , &c.* – Continued. [233]

Name of Reservation	Agency	Denomination	Name of Tribe occupying reservation	Square Miles	Area in Acres	Date of treaty, law, or other authority establishing reserve
			* * *			
Omaha.....	Winnebago & Omaha.....	Do.....	Omaha.....	224	143,225	Treaty of March 16, 1854, vol. 10, p. 1043: selections by Indians with President's approval. May 11, 1855: treaty of March 6, 1865, vol. 14, p. 667, acts of Congress approved June 10, 1872, vol. 17, p. 391 and of June 22, 1874, vol. 18, p. 170, deed to Winnebago Indians dated July 21, 1874
			* * *			

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

ANNUAL REPORT

COMMISSIONER OF INDIAN AFFAIRS

SECRETARY OF THE INTERIOR

THE YEAR 1881.

WASHINGTON
GOVERNMENT PRINTING OFFICE
1881.

* * *

[266] *Schedule showing the names of Indian reservations in the United States, agencies , &c.* – Continued. [267]

Name of Reservation	Agency	Denomination	Name of Tribe occupying reservation	Square Miles	Area in Acres	Date of treaty, law, or other authority establishing reserve
			* * *			
Omaha	Winnebago & Omaha	Do	Omaha	224	143,225	Treaty of March 16, 1854, vol. 10, p. 1043: selections by Indians with President's approval. May 11, 1855: treaty of March 6, 1865, vol. 14, p. 667, acts of Congress approved June 10, 1872, vol. 17, p. 391 and of June 22, 1874, vol. 18, p. 170, deed to Winnebago Indians dated July 21, 1874
			* * *			

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

* * *

LEGISLATIVE JOURNAL

[1467] RESOLUTIONS

LEGISLATIVE RESOLUTION 37. Re: Law Enforcement in Indian Areas.

Introduced by C. W. Holmquist, 16th District, Chairman of the Legislative Council.

WHEREAS, the State of Nebraska was given civil and criminal jurisdiction over Indians and Indian territory in this state by the Act of Congress of August 15, 1953, generally known as Public Law 280; and

WHEREAS, the assumption of such jurisdiction has led to steadily increasing costs for law enforcement in certain counties of Nebraska, and particularly in Thurston County; and

WHEREAS, because of restrictions in original grants of land in Thurston County to Indians and Indian tribes, Thurston County has not had a sufficient tax base to meet the increasing costs of law enforcement; and

WHEREAS, since 1957, state assistance has been provided for law enforcement purposes in Thurston County, and the cost of this assistance has increased each biennium; and

[1468] WHEREAS, Public Law 90-284 adopted. as an Act of Congress on April 11, 1968, contains a number of provisions dealing with civil rights and jurisdiction of Indians; and

WHEREAS, Section 403(a) of Public Law 90-284 provides that the United States is authorized to accept a retrocession of all or any measure of the jurisdiction acquired by a state pursuant to Public Law 280 of 1953; and

WHEREAS, a committee of members of the Legislature appointed by the Executive Board of the Legislative Council following adoption of Public Law 90-284 has studied the problems of law enforcement in Indian areas of this state and the question of a retrocession of jurisdiction, and has met with leaders of the Omaha and Winnebago tribes, county officials, and officials of the Bureau of Indian Affairs.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN EIGHTIETH SESSION ASSEMBLED:

1. That the State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, acquired by the State of Nebraska pursuant to Public Law 280 of 1953, except as provided in paragraph 2 of this resolution.

2. That the retrocession of jurisdiction contained in paragraph 1 of this resolution shall not

apply to any offenses involving the operation of motor vehicles on public roads or highways.

3. That the Executive Board of the Legislative Council is hereby authorized and directed to take all necessary action to put this resolution into effect, such action to include arrangements with the Department of the Interior and the department's Bureau of Indian Affairs concerning the assumption of law enforcement responsibilities in the areas of Indian country covered by this resolution.

Mr. Holmquist moved to suspend the rules to consider LR 37 today. The motion prevailed with 33 ayes, 0 nays and 16 not voting.

LR 37 was adopted with 34 ayes, 0 nays and 15 not voting.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

35 FR 16598

The Office of the President of the United States

(Executive Order)

NEBRASKA

OMAHA INDIAN RESERVATION

*1 NOTICE OF ACCEPTANCE OF RETROCESSION OF JURISDICTION

October 16, 1970

Pursuant to the authority vested in the Secretary of the Interior by Executive Order No. 11435 (33 F.R. 17339), I hereby accept, as of 12:01 a.m., e.s.t., October 25, 1970, retrocession to the United States of all jurisdiction exercised by the State of Nebraska over offenses committed by or against Indians in the areas of Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County, Nebr., as follows:

Commencing at the southwest corner of lot 8 of sec. 34, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence east to the northeast corner of T. 24 N., R. 7 E. of the Sixth Principal Meridian; thence south to the south line of the Omaha Indian Reservation as originally surveyed; thence east along the south line of the Omaha Indian Reservation as originally surveyed to the line between secs. 32 and 33, T. 24 N., R.

10 E. of the Sixth Principal Meridian; thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian; thence north to the northwest corner of sec. 21, T. 24 N., R. 10 E. of the Sixth Principal Meridian; thence east to the eastern boundary line of the State of Nebraska; thence in a northwesterly direction along said boundary line to the north line of sec. 36, T. 26 N., R. 9 E. of the Sixth Principal Meridian extended east; thence west along the section lines to the northwest corner of lot 1 of sec. 36, T. 26 N., R. 7 E. of the Sixth Principal Meridian; thence south to the northeast corner of lot 3 of sec. 12, T. 25 N., R. 7 E. of the Sixth Principal Meridian; thence west to the northwest corner of lot 2, sec. 10, T. 25 N., R. 5 E. of the Sixth Principal Meridian; thence south along the west boundary line of the Omaha Indian Reservation as originally surveyed to the point of beginning except offenses involving the operation of motor vehicles on public roads or highways which retrocession was tendered and offered by Legislative Resolution No. 37 passed by the Legislature of Nebraska in 80th regular session on the 16th day of April 1969.

WALTER J. HICKEL

Secretary of the Interior.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

Welcome to
Thurston County
Nebraska

History

County History

Demographics

Almost a decade before Nebraska became a state, the federal government established a reservation for the Omaha Indian tribe in what today is Thurston County, as well as small portions of Dixon, Burt and Cuming Counties. eventually the northern half of the reservation was purchased from the Omahas for use as a reservation for the Winnebago tribe. The two reservations are still in existence today and cover the entire Thurston County area.

The county's boundaries were established in 1855 by the Territorial Legislature. For a time the area was referred to as Blackbird County, In honor of Omaha Indian Chief Blackbird. When legislators attempted to formally name the county Blackbird in 1887, Gov. John Thayer vetoed the proposal. Two years later the Legislature adopted an act establishing the county's present boundaries and officially naming it after U.S. Sen. John M. Thurston of Nebraska.

There is an interesting footnote regarding Chief Blackbird. One of his favorite campsites was located

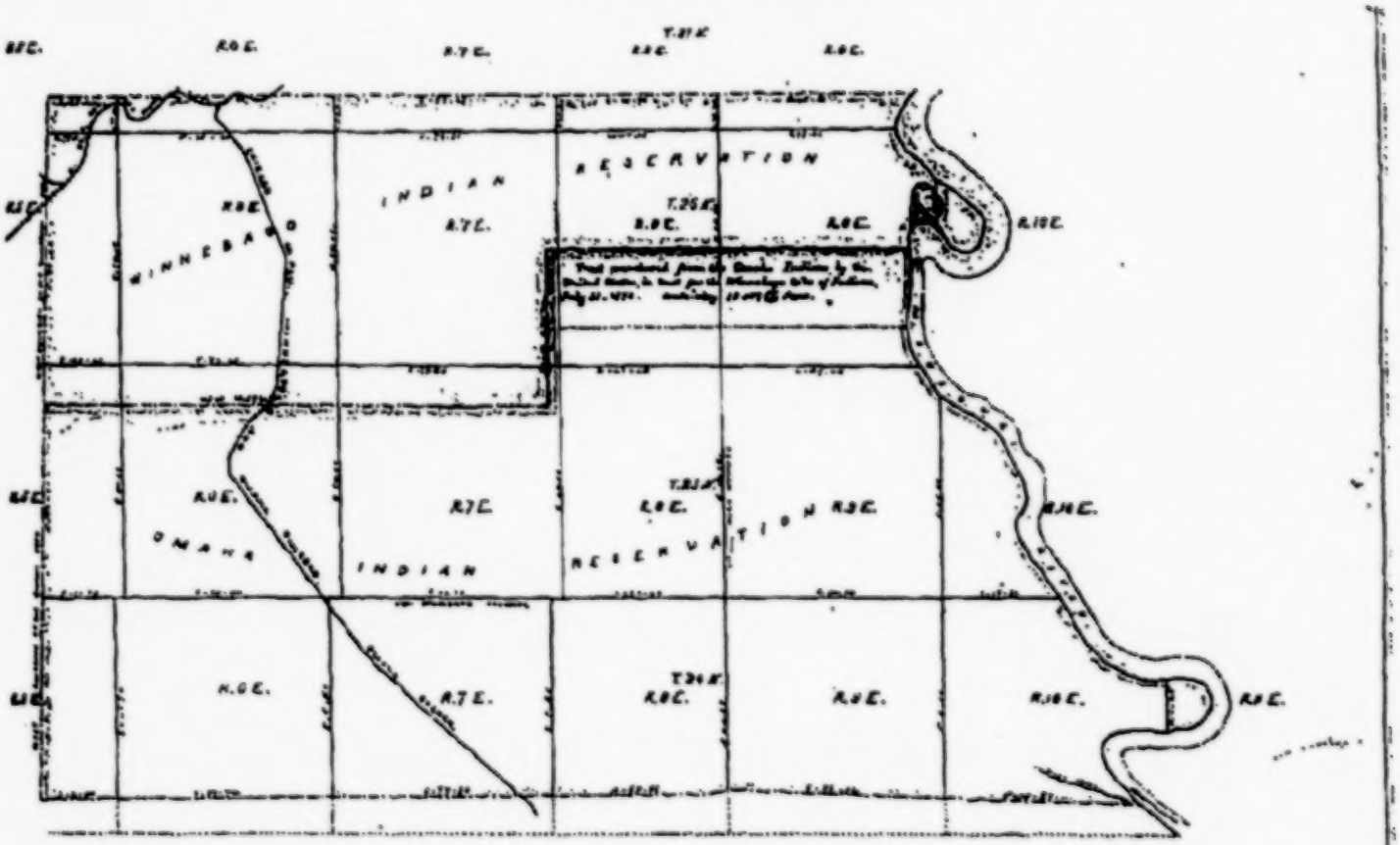
on a hill overlooking the Missouri River. According to Indian legend, when Chief Blackbird died his followers seated him on his horse and buried him at this site.

Federal government officials opened a portion of the Omaha Reservation to white settlers in 1884. The following year the area's first village was established. Buildings from the hamlet of Athens were moved to what is now Pender, the county seat, about two miles to the northwest.

With the passage of the railroads through Thurston County In the early 1900s, additional communities began to be established. One of those communities is Emerson, located in the far northwest corner of the county. Emerson is unique in that it is actually Nebraska's only tri-county community, with sections actually platted in Thurston, Dixon and Dakota counties. Visitors who attempt to locate the exact spot where they can stand and be in all three counties have a difficult time, however, since it is located on Main Street, which is also a state highway.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

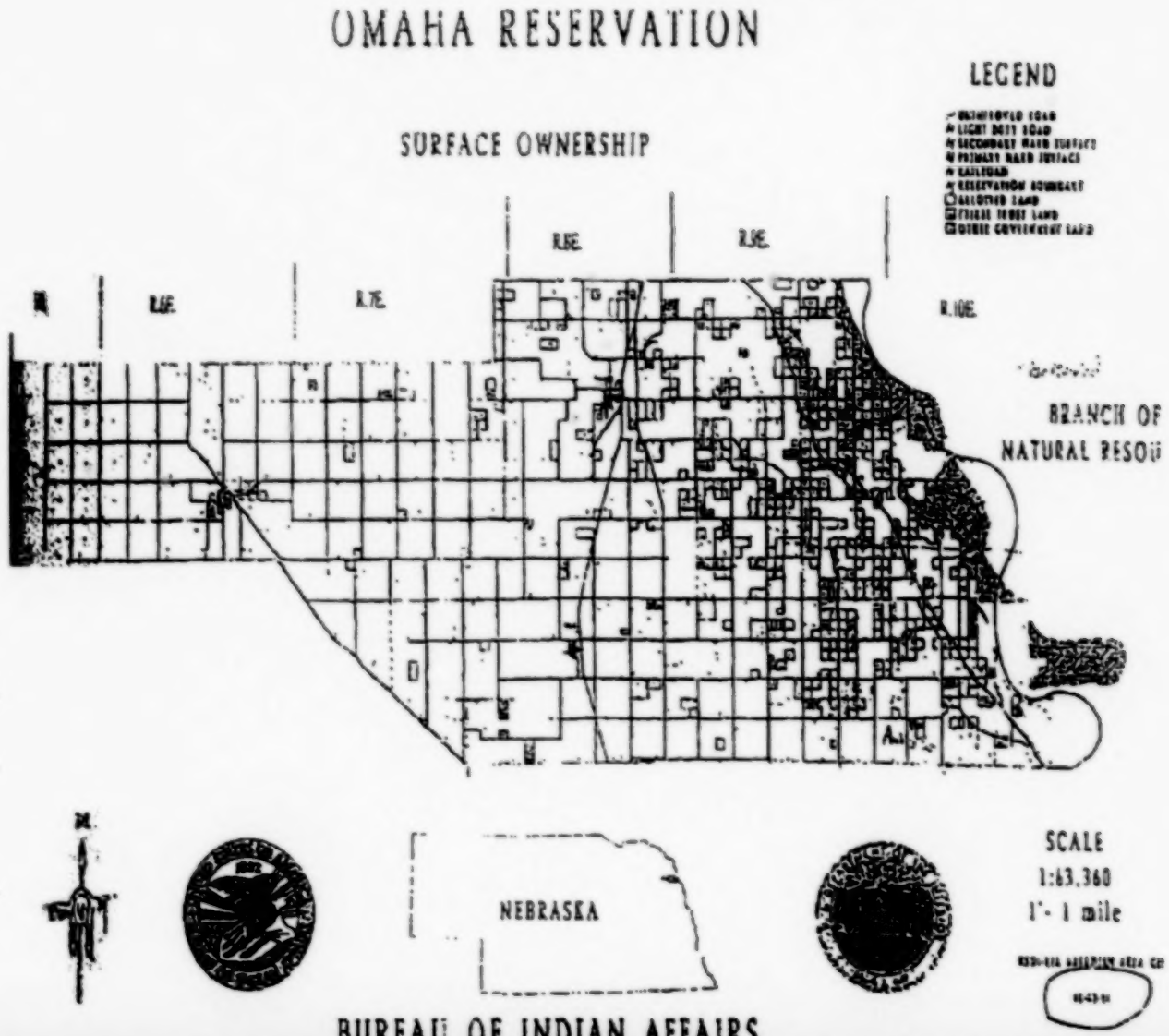


844

EXHIBIT 034

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)



IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

AUG 13 1999

Real Property Management
MC-306

MEMORANDUM

TO: Superintendent, Winnebago Agency

FROM: Area Director, Aberdeen Area

Subject: Western Boundary of Omaha Reservation

I have been asked to define the western boundary of the Omaha Reservation and the land status of 401 South 1st Street. A research by my staff confirms that the Omaha Reservation boundaries have not been changed or altered since its establishment by the survey of 1855, with exception. The surveyor's field notes are found in the "Field notes of the boundary of Omaha Indian reservation" of June 27, 1855, recorded in Ancient and Miscellaneous Surveys, No. 16, Volume 3, diminished by the cession of March 6, 1865 (14 Stat. 667) and the purchase for the Winnebago tribe according to the Act of June 22, 1874 (18 Stat. 146), and recorded as Document No. 383-845, in the records of our Land Titles and Records office.

The Secretary's approval of June 27, 1855, established the Omaha Indians on the site of their present reservation. The area was surveyed, with boundaries being established. We find no changes in the survey,

or the boundaries, with the exception of the upper tier that was purchased for the Winnebago Tribe.

The western boundary of the Omaha Reservation is as depicted on the map titled OMAHA RESERVATION, of August 08, 1996, issued by USDI-BIA ABERDEEN AREA GIS, of March 28, 1999.

With regard to land status of 401 South 1st Street, the records of the Bureau of Indian Affairs, Aberdeen Area office, does not show any land held trust within the City of Pender.

If you have any questions, please contact Titus Marks, Acting Area Realty Officer, at 605/226-7618.

/s/ (Sgd) Cora L. Jones

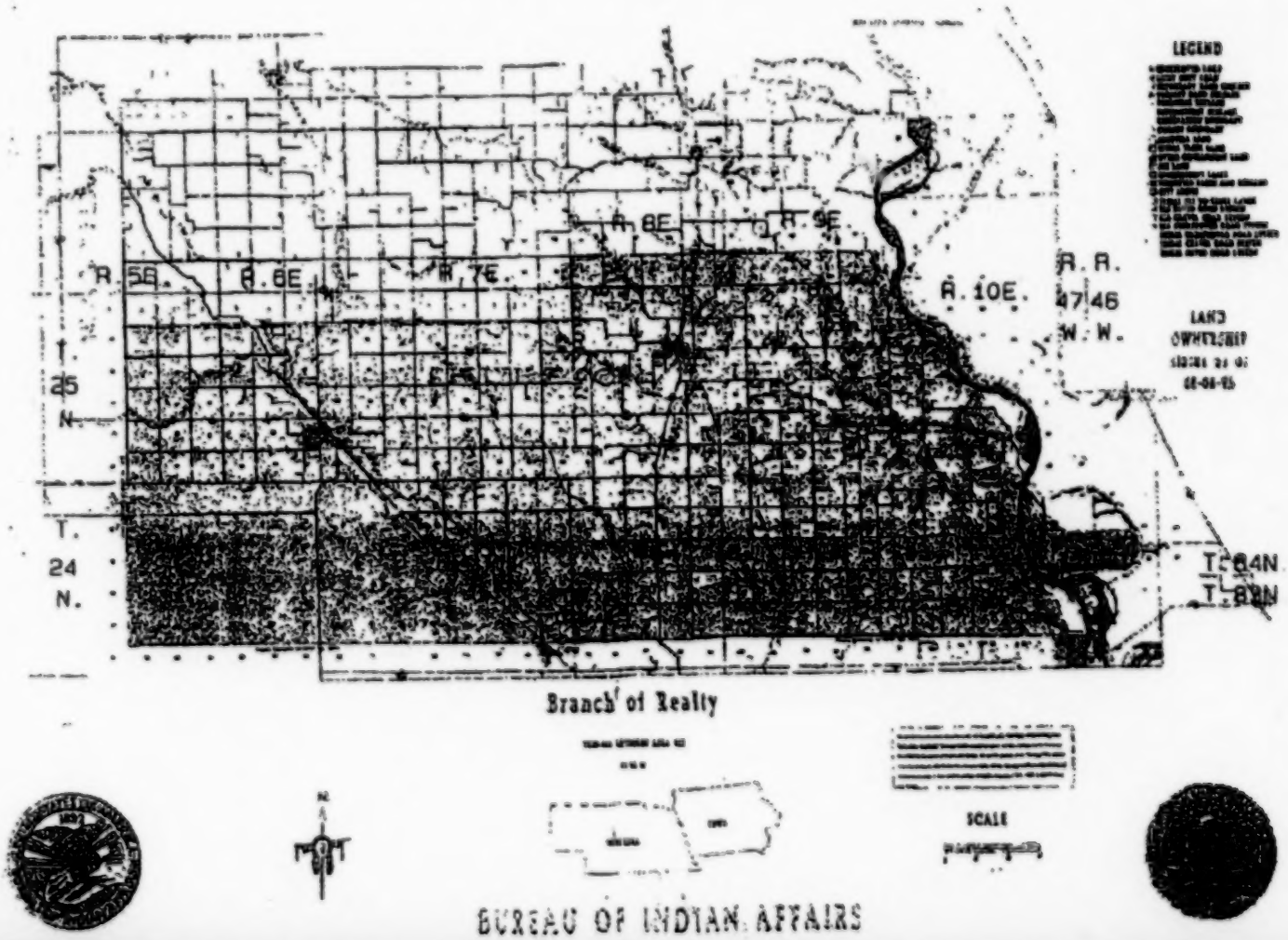
cc.: Chief of Police, Winnebago Agency
District I Commander, Law Enforcement Services

bcc: 306: TMARKS:bs:08/11/99:X7618
RETYPED:TMARKS:bs:08/13/99
Subject/Reading File
Natural Resources, MC-301, Attention: Pat Keatts
LTRO, MC-306A, Attention: [Illegible]
Joe Brewer, Realty Specialist, [Illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

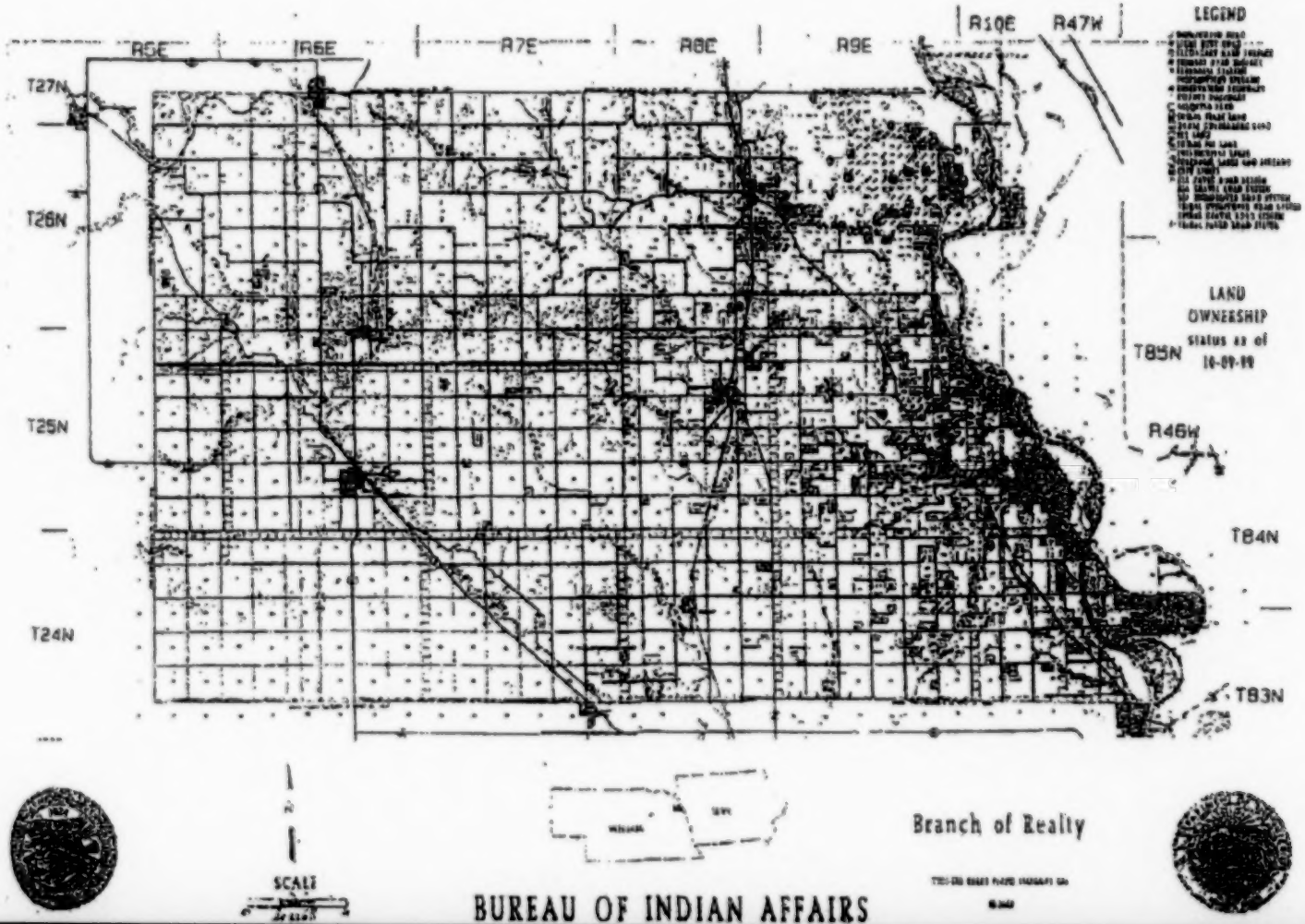
OMAHA RESERVATION



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

WINNEBAGO-OMAHA RESERVATIONS



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

MAY 8, 2007

Ms. Teri D. Lamplot, Chair
Board of County Supervisors
P.O. Box G
Pender, NE 68047

Dear Chairwoman Lamplot:

Thank you for responding to the 2007 Boundary and Annexation Survey (BAS) with your letter of concern. The letter refers to your request that the U.S. Census Bureau revise the boundaries of the Winnebago and Omaha Reservations as per the annotations you made on your 2005 BAS maps. The Census Bureau carefully reviewed the corrections that you made on those materials and were unable to make the changes to our database.

When we receive changes such as this from neighboring governments, we consult additional sources to verify the boundaries. It is the policy of the Census Bureau to defer, to the Department of Interior, Bureau of Indian Affairs (BIA) Solicitor's Office for a legal opinion on boundary disagreements. Our current

depiction of the Winnebago and Omaha Reservations boundaries is based on information the solicitor provided to us as we prepared for Census 2000. The BIA provided maps produced in 1999 that clearly depict the boundaries or both reservations, as well as the status of landownership within the reservations at that time. While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no new legal opinion, federal court decision, Act of Congress, etc., has altered those boundaries.

We have recently contacted the Solicitor's Office to confirm that the boundaries are correct, but have not yet received their response. In the meantime, the Census Bureau must maintain the boundaries of Winnebago and Omaha Reservations as they are currently depicted.

If you have any questions, please contact Barbara Saville of my staff. She may he reached at 301-763-9046. Again, thank you for taking the time to write.

Sincerely,

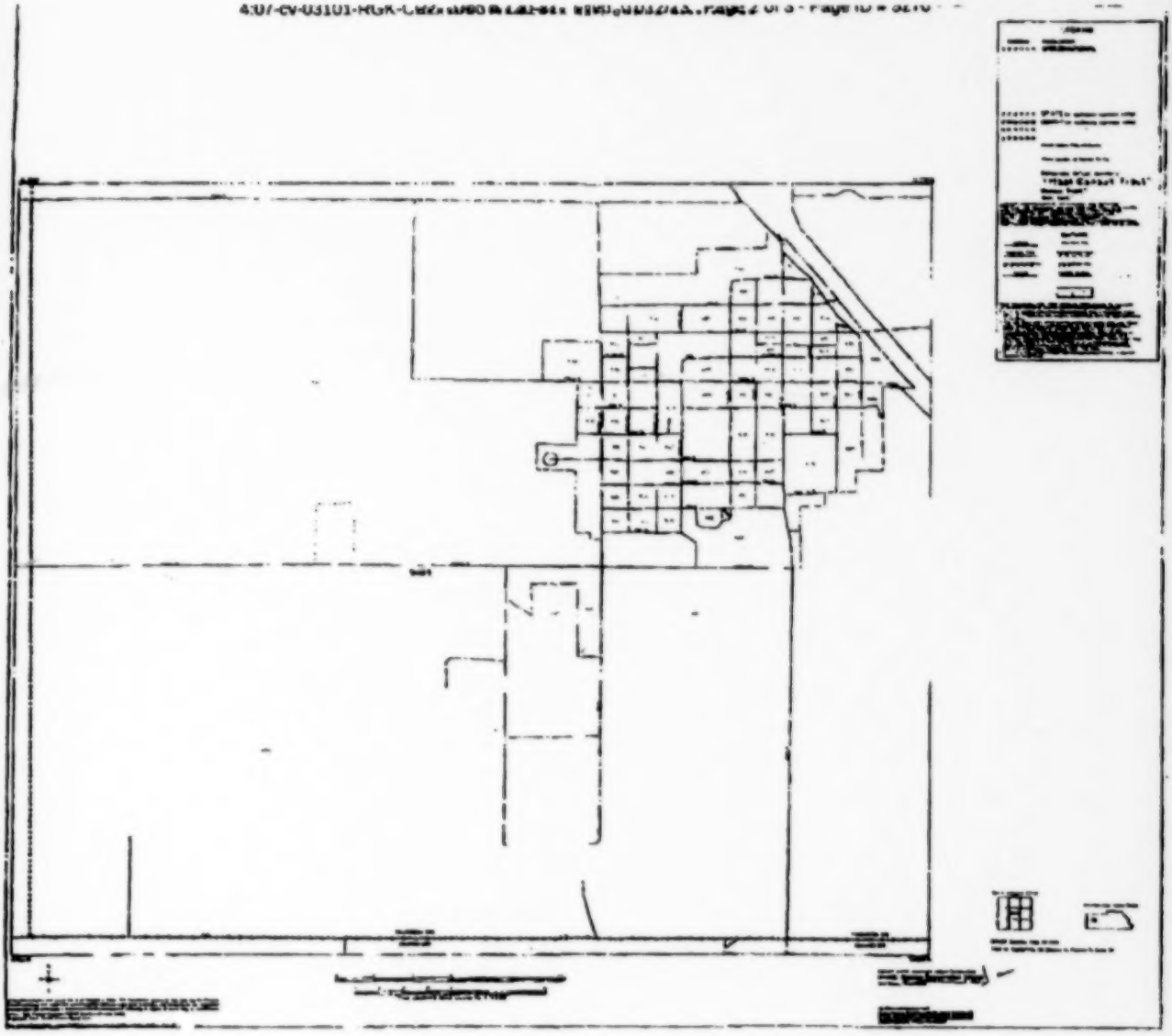
/s/ Robert A. LaMacchia

Robert A. LaMacchia
Chief, Geography Division

cc: Omaha Tribe of Nebraska
Winnebago Tribe of Nebraska

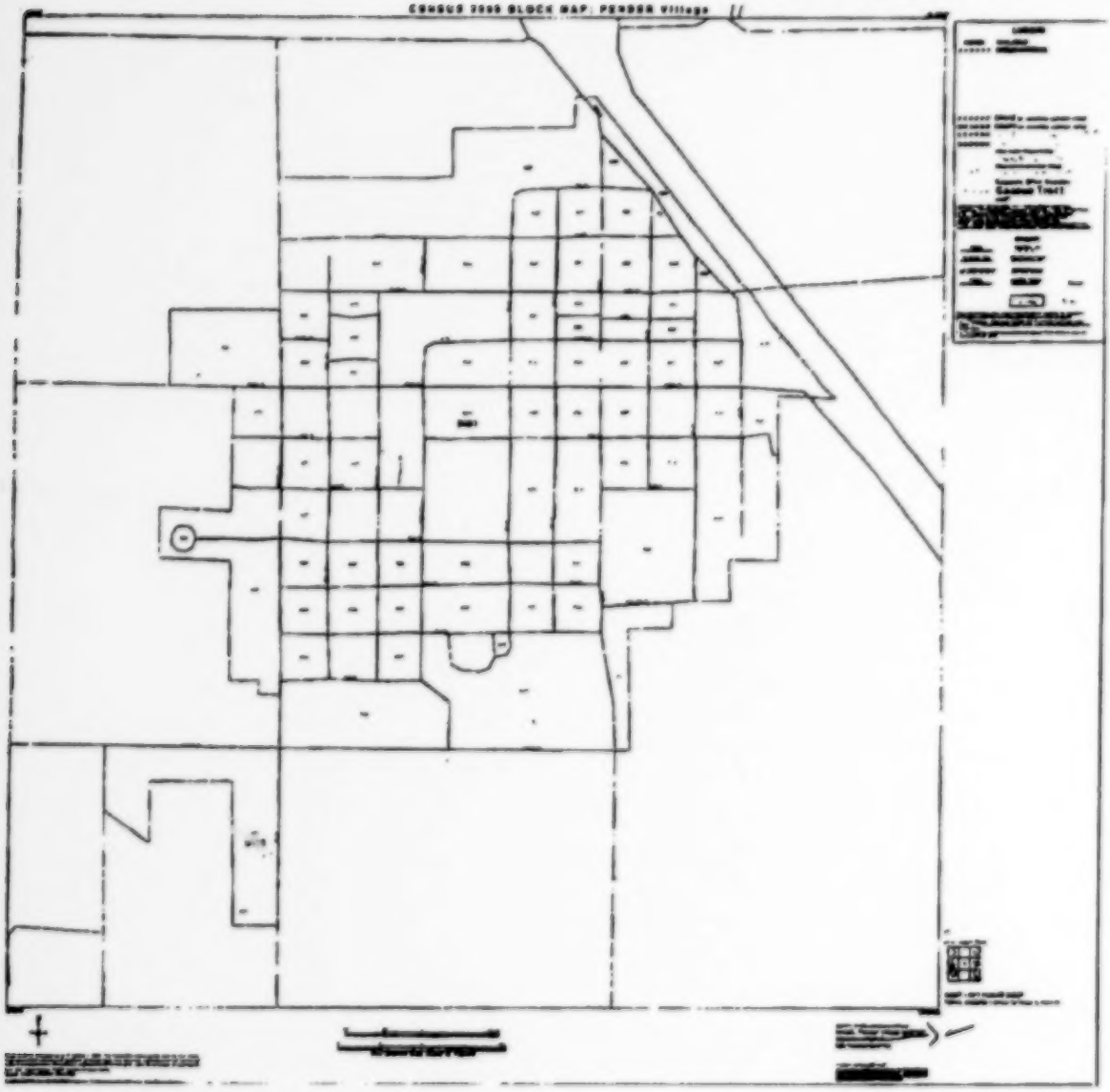
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

[SEAL]

UNITED STATES
DEPARTMENT OF COMMERCE
Economics and
Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

MAY 8 2007

Ms. Teri D. Lamplot, Chair
Board of County Supervisors
P.O. Box G
Pender, NE 68047

Dear Chairwoman Lamplot:

Thank you for responding to the 2007 Boundary and Annexation Survey (BAS) with your letter of concern. The letter refers to your request that the U.S. Census Bureau revise the boundaries of the Winnebago and Omaha Reservations as per the annotations you made on your 2005 BAS maps. The Census Bureau carefully reviewed the corrections that you made on those materials and were unable to make the changes to our database.

When we receive changes such as this from neighboring governments, we consult additional sources to verify the boundaries. It is the policy of the Census Bureau to defer, to the Department of Interior, Bureau of Indian Affairs (BIA) Solicitor's Office for

a legal opinion on boundary disagreements. Our current depiction of the Winnebago and Omaha Reservations boundaries is based on information the solicitor provided to us as we prepared for Census 2000. The BIA provided maps produced in 1999 that clearly depict the boundaries of both reservations, as well as the status of land ownership within the reservations at that time. While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no new legal opinion, federal court decision, Act of Congress, etc., has altered those boundaries.

We have recently contacted the Solicitor's Office to confirm that the boundaries are correct, but have not yet received their response. In the meantime, the Census Bureau must maintain the boundaries of Winnebago and Omaha Reservations as they are currently depicted.

If you have any questions, please contact Barbara Saville of my staff. She may be reached at 301-763-9046. Again, thank you for taking the time to write.

Sincerely,

/s/ Robert A. LaMacchia

Robert A. LaMacchia
Chief, Geography Division

cc: Omaha Tribe of Nebraska
Winnebago Tribe of Nebraska

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

[LOGO] nebraska department of revenue

Revenue Ruling 99-92-1

Supersedes Revenue Ruling 99-90-1

State Taxation – Definition of Nebraska Indian Reservation. A NEBRASKA INDIAN RESERVATION INCLUDES ALL LAND WITHIN THE ORIGINAL EXTERIOR BOUNDARY OF THE RESERVATION.

Advice has been requested as to what constitutes a Nebraska Indian reservation for tax exemption purposes.

All land within the original boundaries of any Nebraska Indian reservation which has not been specifically removed by an act of Congress or Executive Order is part of the Indian reservation for Nebraska tax purposes regardless of the ownership of the land.

In Nebraska, reservations include the Santee Sioux, Omaha, Winnebago, Iowa, and Sac and Fox Indian Reservations. These reservations were established by treaty.

The Santee Sioux Reservation, as established by an 1866 treaty, is located in the northeastern portion of Nebraska and north central Knox County. The original reservation covers an area 16 miles north to south

by 12 miles east to west and is described approximately by the following description:

> From the southeast corner of township 31 north, range 4 west, section 36, go 12 miles west to township 31 north, range 5 west, southwest corner of section 31. Then north 10 miles to the Nebraska-South Dakota border. Then north and east along the border to township 33 north, range 4 west, northeast corner of section 24. Then 14 ¾ miles to the southeast corner of township 31 north, range 4 west, section 36.

The Omaha Reservation, as established by an 1854 treaty, is located primarily in the southern half of Thurston County with a few sections in adjacent Burt County and Cuming County all in northeastern Nebraska. It can be described approximately as follows:

> From the point at which Wood Creek enters the Missouri River at township 24 north, range 10 east, section 36, go due west 30 ½ miles to township 24 north, range 5 east to a point in the northeast corner of section 34. Then north 5 ¼ miles to township 24 north, range 5 east, northwest corner of section 2. Then east ⅛ mile. Then due north 5 miles to township 25 north, range 5 east, northeast corner of section 10. Then due east 13 ¾ miles to township 25 north, range 7 east, northeast corner of section 12. Then 2 miles due north to township 26 north, range 7 east, northeast corner of section 36. Then due east to the Iowa border then south along the border to Wood Creek.

The Winnebago Reservation, as established by an 1865 treaty, is located primarily in the northern half of Thurston County with a few sections in adjoining Dixon County and entirely in northeastern Nebraska. It is described approximately as follows:

> From the point the Iowa border meets the southeast corner of lot 4, section 25, township 26 north, range 9 east, go due west 9 ¾ miles to township 26 north, range 7 east, northeast corner of section 25. Then due south 2 miles to township 25 north, range 7 east, northeast corner of section 12. Then west 13 ¾ miles to township 25 north, range 5 east, northeast corner of section 10 then north 8 ⅛ miles to township 27 north, range 5 east, northwest corner of section 35. Then due east to the Iowa-Nebraska border. Then south along the border to the beginning point.

The Iowa Indian Reservation, as established by an 1854 treaty, is located in the southeast corner of the state in Richardson County on the Iowa-Kansas-Nebraska border. It is described as follows:

> Starts at the mouth of Squaw Creek where it enters the Missouri River. Due South one mile, due West to No Hearts Creek. Down No Hearts Creek to Big Nemaha River. Down Big Nemaha River to Missouri River. Down Missouri River to mouth of Squaw Creek.

The Sac and Fox Indian Reservation, as established by an 1854 treaty, is located in the southeast corner of the state in Richardson County to the west and

next to the Iowa Indian Reservation on the Kansas-Nebraska border. It is described as follows:

> Southern boundary of Iowa Indian Reservation continue on West to Walnut Creek. Up Walnut Creek to Big Nemaha River, Down Big Nemaha River to No Hearts Creek. Up No Hearts Creek to point of beginning.
>
> No Hearts Creek is a common boundary between Iowa Reservation and Sac and Fox Reservation.

The cities, towns, and villages of Pender, Thurston, Winnebago, Macy, Walthill, Rosalie, Santee, and Lindy are located within the boundaries of the Santee Sioux, Omaha, and Winnebago Reservations. The City of Emerson, south of First Street, is also within the Winnebago Reservation. The village of Preston is located within the Sac and Fox Indian Reservation. No cities, towns, or villages are located within the Iowa Indian Reservation.

APPROVED:

/s/ M. B. Balka
M. Berri Balka
State Tax Commissioner

March 6th, 1992

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

STATE OF NEBRASKA

DEPARTMENT OF REVENUE September 22, 2005 [SEAL]
Mary J. Egr Edson — Dave Heineman
Tax Commissioner — *Governor*

MOTOR FUELS DIVISION
Janet A. Lake
Administrator

901 Centennial Mall South • P.O. Box 98904 •
Lincoln, Nebraska 68509-8904 •
Phone (402) 471-5730 • Fax (402) 471-5607
www.revenue.ne.gov/fuels
An Equal Opportunity/Affirmative Action Employer

Benjamin W. Thompson
Johnson Thompson LLP
10844 Old Mill Road, Suite 4
Omaha, NE 68154

Dear Mr. Thompson:

Enclosed is a copy of the signed Agreement for the Collection and Dissemination of Motor Fuel Taxes between the State of Nebraska and the Omaha Tribe of Nebraska.

As stated in the agreement, it shall commence on October 1, 2005. We have notified all parties responsible for collection of the tax on the Omaha reservation that they will begin collecting the tribal tax

effective October 1, 2005. We have also notified the Santee-Sioux and Winnebago of this agreement.

Thank you for your assistance. If you have any questions, please contact me at 402-471-5678.

FOR THE STATE TAX COMMISSIONER

Sincerely,

/s/ Janet A. Lake
Janet A. Lake
Administrator
Motor Fuels Division

JAL:709:skm

Enclosure

AGREEMENT FOR THE COLLECTION AND DISSEMINATION OF MOTOR FUEL TAXES BETWEEN THE STATE OF NEBRASKA AND THE OMAHA TRIBE OF NEBRASKA

PREAMBLE

WHEREAS, the Omaha Tribe of Nebraska (hereinafter sometimes referred to as the "Tribe") is a federally recognized Indian tribe with a governmental structure recognized by the Bureau of Indian Affairs, United States Department of Interior;

WHEREAS, the federal law of the United States of America provides that recognized Indian tribes have certain governmental authority;

WHEREAS, the Tribe is situated on and occupies a federally established Indian Reservation situated in the northeastern part of the State of Nebraska known as the Omaha Indian Reservation (hereinafter sometimes referred to as the "Reservation");

WHEREAS, the Tribe has established and currently maintains a tribal government, which government provides certain services to the Tribe and to Indians residing on the Reservation and within the Tribe's Service Area;

WHEREAS, the provision of said services by the Tribe's government to the Tribe and to Indians residing on the Reservation and within the Tribe's Service Area, is in keeping with the policies and laws of the United States Federal Government regarding Indian tribal self-government and self-sufficiency;

WHEREAS, federal Indian law and federal Indian policy generally preempt state law and state policy as to activities by the Tribe and the enrolled members of the Tribe on the Reservation;

WHEREAS, the retail facilities on the Reservation are provided for the convenience of the tribal members;

WHEREAS, the State believes that its excise taxes are applicable to transactions that occur on reservations involving sales of motor fuels to non-Indians and not to transactions that occur on reservations involving such sales to Indians;

WHEREAS, the Tribe believes that it has the exclusive right to tax transactions that occur on the Tribe's reservation involving sales of fuel to Indians;

WHEREAS, the State is of the view that cooperation and negotiation between the State's governmental agencies and political subdivisions, and the governments of federally recognized Indian tribes is more productive and beneficial to the interests of the State and the citizens of the State, including citizens of the State who are enrolled members of federally recognized Indian tribes, and better serves those interests than engaging in costly and extensive litigation;

WHEREAS, the Tribe is of the view that cooperation and negotiation between the Tribe and the State is more productive and beneficial to the interests of the Tribe and its members, and better serves those interests than engaging in litigation;

WHEREAS, the State and the Tribe agree that it will serve the interests of both the State and the Tribe for the Tribe to be able to generate revenue for governmental purposes, through the collection of certain tribal taxes in accordance with this Agreement; WHEREAS, NEB.REV.STAT. § 66-741 authorizes the Governor or his designee to enter into Agreement(s) with the governing body of a federally recognized Indian tribe within the State of Nebraska concerning the collection and dissemination of any motor fuel tax on sales of motor fuel made on a federally recognized Indian reservation;

NOW THEREFORE, the State of Nebraska (hereafter sometimes referred to as "State") through Dave Heineman, Governor, and Mary J. Egr Edson, Nebraska Tax Commissioner, and the Tribe, through Orville Cayou, its Tribal Chair, properly authorized by a resolution of the Omaha Tribal Council hereto attached as Exhibit A, do hereby enter into this Agreement for the mutual benefit of, and to avoid litigation between, the State of Nebraska and the Omaha Tribe of Nebraska, to-wit:

Part I. INTRODUCTION

1. The State hereby recognizes that the Tribe enjoys, under United States federal law, as a federally recognized Indian tribe situated on a federally recognized reservation, exemptions from the assessment of certain state taxes.

Part II. TERM

2. This Agreement shall commence on October 1, 2005. Its term shall be perpetual, subject to the provision for early termination set forth in Part V below.

PART III. MOTOR FUELS

3. Any motor fuel received within the boundaries of the Reservation shall be exempt from the imposition of the tax on these products as levied under the laws of the State of Nebraska.

4. The Tribal Council of the Tribe has enacted an ordinance codified in the Omaha Tribal Code imposing a tax on motor fuel, as defined under the laws of the State of Nebraska, received within the boundaries of their Reservation, which is and shall remain at the same rate and base of transaction as provided under the laws of the State of Nebraska. This ordinance shall remain in effect as long as this Agreement is in effect, as a condition for the State granting an exemption on motor fuel taxes. A copy of said ordinance is attached hereto as Exhibit B.

5. All proceeds derived from the taxes imposed pursuant to the ordinance referenced in Section 4 of this Agreement, except that portion retained by the State of Nebraska pursuant to Section 8 of this Agreement, shall be used for general governmental purposes including but not limited to road construction and maintenance, economic development, and general health and welfare programs and services for tribal members.

6. This exemption shall only apply to receipt of motor fuel that occurs at retail outlets located on the Reservation in Nebraska and within the boundaries of the Reservation in Nebraska as are set forth in the Preamble of this Agreement, This exemption shall not apply to transactions involving motor fuel that occur at any retail outlets outside the boundaries of the Reservation in Nebraska nor to any activity by the Tribe as a motor fuel supplier, distributor, wholesaler, importer, or exporter.

7. The Omaha Tribe of Nebraska agrees not to license or otherwise authorize an individual tribal member or other person or entity to sell motor fuel in violation of the terms of this agreement.

8. In no event shall any motor fuel tax refunds be allowed to individual tribal members for any motor fuel purchased on the Reservation while this Agreement is in effect.

PART IV. REVENUE SHARING

9. The Omaha Tribe of Nebraska shall remit the fuel tax on sales at tribally operated enterprises within Nebraska to their supplier. Not later than the 25th day of the second month following the close of the tax period, the State of Nebraska Department of Revenue shall determine the gallons of motor fuel received by all retailers on the Reservation in the preceding month and issue to the Tribe a warrant representing 75 percent of the taxes imposed on motor vehicle fuels, and 60 percent of the taxes imposed on diesel fuel pursuant to the ordinance set forth in Section 4 of this Agreement. These percentage amounts have been determined based upon good faith negotiations between the parties based upon the following formula: approximately one-half of the estimated percentage of residents living within the exterior boundaries of the Reservation are tribal members (both the State and the Tribe agree that the State has no arguable claim to levy its motor fuels excise taxes on tribal members on the Reservation); the State and

Tribe will share the remaining percentage as each believes it has the exclusive right to tax those transactions. For diesel the formula is based upon the assumption that most diesel is sold to large trucks, and an indeterminate amount of those trucks are involved in IFTA, so that they receive full credit for tax paid to the State. Upon written request by either party, hut not more than once every five years, these amounts may be reviewed and adjusted under the same formula as set forth above.

10. The amount to be remitted to the Tribe monthly shall be determined by calculating the total gross gallons of motor vehicle fuel received by all retailers on the Reservation less any sales exported, sold to another wholesaler, or sold to the U.S. Government. The resulting gallons are multiplied by the appropriate tax rate in effect at the time, and then 75 percent of the motor vehicle fuel tax is remitted to the Tribe. Additionally, the amount for diesel fuel shall be determined by calculating the total gross gallons of diesel fuel received by all retailers on the reservation less any sales exported, sold to another wholesaler, or sold to the U.S. Government. The resulting gallons are multiplied by the appropriate tax rate in effect at the time, and then 60 percent of the diesel fuel tax is remitted to the Tribe.

PART V. GENERAL PROVISIONS

11. The Tribe agrees to keep accurate records setting forth information in sufficient detail to allow for

verification that the Tribe and tribal-owned entities are remitting the correct amount of tax due pursuant to this Agreement. Upon reasonable request of the State, and subject to the confidentiality provisions of the State, the State may conduct an examination of the records of the Tribe and tribal-owned entities for the sole purpose of verifying compliance with the requirements of this Agreement. Such examination shall be strictly limited to those enterprise activities of the Tribe or tribal-owned entities which engage in motor fuels sales and may include examination of summary reports, exemption certificates, ledgers, cash register tapes and similar records. Nothing in this section authorizes any examination of the records of any part of the Tribe or tribal-owned entity which does not engage in motor fuels sales and nothing in this section authorizes any examination of any records that goes beyond what is needed to verify compliance with the requirements of this Agreement.

12. Upon completion of an examination of records by the State pursuant to this Agreement, the State shall issue a report to the Tribe containing the results. If the report indicates a change in liability, the Tribe may challenge that report by requesting a redetermination from the State. The request must be made in writing within 30 days following issuance of the report. If any dispute still exists between the parties, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.

13. Upon reasonable request of the Tribe, and subject to the confidentiality provisions of the State, the Tribe may conduct an examination of the State's records of fuel tax returns of retailers located upon the Reservation used to calculate the remittance to the Tribe for the sole purpose of verifying compliance with the requirements of this Agreement. Nothing in this section authorizes any examination of the records of any part of the retailers' activities that goes beyond what is needed to verify compliance with the requirements of this Agreement.

14. Upon completion of an examination of records by the Tribe pursuant to this Agreement, the Tribe shall issue a report to the State containing the results. If the report indicates a change in liability, the State may challenge that report by requesting a redetermination from the Tribe. The request must be made in writing within 30 days following issuance of the report. If any dispute still exists between the parties, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association.

15. The right of examination or audit shall exist during the term of the Agreement and for a period of three years after the date of any termination or expiration of the Agreement.

16. The execution of this Agreement by the Tribe shall not effect nor be a waiver of any other claim or right that the Tribe, or its enrolled members, has or may have to be exempt from the assessment from any

other state tax for activities that occur on the Reservation.

17. The State certifies that this Agreement is entered into by the State voluntarily, and without coercion, and for the purposes of avoiding litigation as to the subject matter covered by this Agreement. Further, the execution of this Agreement by the State is not and shall not be a release, waiver or compromise of any defense, claim or right of the State as to any of the Tribe's claims referred to in the paragraph above or otherwise.

18. The parties hereto represent that this instrument contains all of the terms, provisions and conditions of this Agreement and the subject matter covered thereby, that there are no unwritten agreements or oral understandings existing as to the subject of this Agreement, and that any amendment and/or modification of this Agreement shall not be effective until reduced to writing and properly executed by all parties hereto.

19. Notwithstanding any other provision of this Agreement, this Agreement shall immediately cease and terminate, without notice or other action, as follows:

A. If the United States Federal Government, or its appropriate department or agency, rescinds or otherwise terminates the recognition of the Tribe as a federally recognized Indian tribe; or

B. If the Tribe 1) abandons or otherwise acts in a manner evidencing the fact that it has given up or terminated its status as a federally recognized Indian tribe; or if a court of competent jurisdiction renders a judgment, and that judgment becomes final, declaring that the Tribe is not a federally recognized Indian tribe, 2) has abandoned or otherwise terminated such status, 3) that such status has been rescinded or terminated or 4) has abandoned or given up or terminated its entitlement to the tax exemptions, or any of them, that are the subject of this Agreement.

20. In the event that one of the parties to this agreement, or any employee, representative, or official of such a party fails to comply with any term, condition, covenant or requirement of this Agreement, or is otherwise in breach of this Agreement, the other party may declare this Agreement 1) suspended in whole or in part, or 2) terminated in whole or in part. Prior to suspending or terminating this Agreement, in whole or in part, a party hereto shall deliver a written-notice to the other party which identifies the conduct, action, and/or inaction that violates this Agreement. The party violating this Agreement shall have ninety (90) days from the date of receipt of such notice in which to cure the default or breach of this Agreement and to provide the other party hereto with written notice of such curing. At the end of such ninety (90) day period, if the default or breach complained of in said notice is not cured, then in that event this Agreement shall immediately be suspended

or terminated according to the terms of the said notice of default or breach.

21. The parties hereto covenant and agree that any declarations contained herein by either party are for the purposes solely of this Agreement and are not and shall not be deemed admissions, concessions or a waiver of any claims or defenses that might be available to either party in any lawsuit or proceeding that may be commenced or filed by either party hereto or by some other person or entity not a party hereto, nor shall this Agreement be competent evidence in any judicial or administrative proceeding or suit other than a proceeding or suit involving the specific subject covered by this Agreement.

22. The State declares that in addition to the considerations herein above expressed, it has negotiated and entered into this Agreement, and has agreed to the terms and conditions contained herein, based substantially on the factual situation and circumstances of the Omaha Tribe of Nebraska, including but not limited to such matters as: location of the Tribe's lands in trust, the proximity of those lands in trust to highways, towns, and non-tribal populations, the size of the Tribe's Service Area, the Tribe's reservation population, economic development in the area of the reservation, the prospects for the Tribe's further economic development on its lands in trust, and the anticipated volume of sales of the items subject to the taxes for which exemptions are herein and hereby granted. Accordingly, no provision of this Agreement

shall in any manner be binding upon, or set a precedence upon any other Agreement with any other Tribe.

Omaha Tribe of Nebraska

/s/ Orville Cayou
Orville Cayou
Chairman

Signed this 15 day of September, 2005.

State of Nebraska

/s/ Dave Heineman
Dave Heineman
Governor

Signed this 20th day of September, 2005.

/s/ Mary Jane Egr Edson
Mary Jane Egr Edson
State Tax Commissioner

Signed this 20th day of September, 2005.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, et al., Plaintiffs, v. MITCHELL PARKER, et al., Defendants.	Civil Action No. 4:07CV3101 **DECLARATION OF MAURICE R. JOHNSON**

STATE OF IOWA)
) ss.
COUNTY OF TAMA)

I, Maurice R. Johnson, being first duly sworn under oath, state and allege as follows:

1. My name is Maurice R. Johnson. I am competent to testify about the matters set forth herein and do so from personal knowledge.

2. I am an attorney and am licensed to practice law in the State of Nebraska. During my legal career, I represented the Omaha Tribe of Nebraska ("OTN") from 1995 to 1998, 2002 to 2007, and 2007 to 2008, the last year as in-house counsel.

3. I am familiar with various efforts that the OTN made throughout my tenure as counsel relating to its presence in the western region of the Omaha Tribe of Nebraska reservation and, in particular, within the Village of Pender.

4. For the most part, the OTN's efforts were met with anger and hostility with many instances of expressions of overt racism.

5. For example, in approximately 2003, the OTN received a federal grant relating to roads. A requirement of the grant was the exercise of traffic safety checks in order to determine whether people were wearing seatbelts. There was opposition from the Pender community and, specifically, the Pender police, who challenged the OTN's authority to administer the safety checks. The actions of the Pender police were provocative and very nearly resulted in physical violence.

6. Also, in or around the summer of 2002, officials from the Environmental Protection Agency, Region 7 in Kansas City, visited Pender to publicly discuss the OTN administering federal regulations on pesticide and fungicide control on the OTN reservation, including Pender. As I recall, the meeting, which was of a "town hall" variety, was very heated. Many statements made by persons from Pender and the surrounding area during the meeting were anti-Native American. I recall such comments as "We're not going to have Indians telling us how to farm." I also specifically recall one local citizen querying "How

about if I change my name to 'Spotted Eagle,' can I then tell white people how to farm their land?"

7. Finally, efforts were made to cross-deputize police officers among the OTN, Thurston County Sheriff, and the Nebraska State Patrol to facilitate law enforcement on the OTN reservation by defining policing relationships, delineating powers, and encouraging cooperation. Thurston County absolutely refused to join any cross-deputization efforts, claiming that the tribal officers were not qualified despite the fact that tribal police receive the same or comparable training, and the willingness of the Nebraska State Patrol to participate in such an agreement.

8. Then-Governor Johanns made valiant efforts to mediate and convince Thurston County that such would be done in the interest of public safety, to no avail. Although cross-deputization did occur with the State Highway Patrol and with the Walthill Police Department, Thurston County would not engage in any fruitful discussions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 7th day of August, 2012.

/s/ Maurice R. Johnson
Maurice R. Johnson

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

THE VILLAGE OF PENDER, NEBRASKA, et al., Plaintiffs, v. MITCHELL PARKER, et al., Defendants.	Civil Action No. 4:07CV3101 **DECLARATION OF AMEN SHERIDAN**

STATE OF IOWA)
) ss.
COUNTY OF TAMA)

I, Amen Sheridan, being first duly sworn under oath, state and allege as follows:

1. My name is Amen Sheridan. I am competent to testify about the matters set forth herein and do so from personal knowledge.

2. I am a resident of and familiar with the environs of Thurston County, Nebraska including the Pender area.

3. In 2009, the Environmental Protection Agency (EPA), Region 7, brought an administrative enforcement action against Krusemark Ag, Inc. for

the assessment of civil penalties pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 and related federal regulations (the "EPA Action"). On December 1, 2009, the EPA entered into and filed a Consent Agreement and Final Order attached hereto as *Exhibit "A"* with respect to the EPA Action.

4. Krusemark Ag, Inc. is located at 58395 849th Road, Pender, Nebraska 68047 and is a pesticides producing establishment (the "Krusemark Ag Facility"). The Krusemark Ag Facility is situated and operates west of the abandoned Sioux City and Nebraska Railroad right of way highlighted on the map attached hereto as *Exhibit "C"*.

5. In December 2007, the EPA published a Fact Sheet in which the EPA indicated its intent to issue final National Pollutant Discharge Elimination System (NPDES) permits to the concentrated animal feeding operations (CAFO) of Bruns Feedlot, LLC. A copy of the EPA NPDES permit Fact Sheet is attached hereto as *Exhibit "B"*.

6. Bruns Feedlot, LLC is located at 1172 I Ave Pender, Nebraska 68047. Bruns Feedlot, LLC is situated and operates west of the abandoned Sioux City and Nebraska Railroad right of way highlighted on *Exhibit "C"*.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 9th day of August, 2012.

/s/ Amen Sheridan
Amen Sheridan

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 N. 5TH STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

In the Matter of Krusemark Ag, Inc. 58395 849th Road Pender, Nebraska Respondent	)	Docket No. FIFRA-07-2009-0026 CONSENT AGREEMENT AND FINAL ORDER

CONSENT AGREEMENT AND FINAL ORDER

The U.S. Environmental Protection Agency (EPA), Region 7, and Krusemark Ag, Inc. (Respondent), have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

FACTUAL ALLEGATIONS

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 1361.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Parties

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region 7.

4. The Respondent, Krusemark Ag, Inc., is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

Alleged Violations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA and federal regulations promulgated thereunder, as follows:

6. Respondent's facility is located at 58395 849th Road, Pender, Nebraska, and is a registered pesticides producing establishment with EPA Establishment Number 62201-NE-001.

7. Section7(c) of FIFRA, 7 U.S.C. § 136e(c), requires any producer operating a registered pesticide-producing establishment to inform EPA of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides, which it is producing, which it has produced during the past year, and which it has sold or distributed during the past year. The information required by this paragraph shall be kept current and submitted to the Administrator annually as required by such regulations as the Administrator may prescribe. The regulation found at 40 C.F.R. § 167.85(d) requires such pesticides report to be filed annually on or before March 1, even if the producer has produced no pesticidal products for that reporting year.

8. Respondent has failed to comply with Section 7(c) of FIFRA, 7 U.S.C. § 136(c), and with the regulations found at 40 C.F.R. § 167.85(d) in that it did not file the 2008 annual pesticides reports for the above facility by March 1, 2009, as required.

9. It is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for any person who is a pesticides producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.

CONSENT AGREEMENT

It is hereby agreed and accepted by the parties, that:

1. This Consent Agreement and Final Order is being entered into by the parties in full settlement of and release from all FIFRA civil penalties that might have attached as a result of allegations made above, Respondent has read the Consent Agreement, consents to its issuance, and will comply with the terms of the Final Order.

2. Respondent admits the jurisdictional allegations of this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order set forth below.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Consent Agreement and Final Order.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order accompanying this Consent Agreement.

5. Respondent certifies by signing this Consent Agreement and Final Order that, to the best of its knowledge, it is presently in compliance with FIFRA, 7 U.S.C. § 136 et. seq., and all regulations promulgated thereunder.

6. Nothing in this Consent Agreement shall be construed as a release from any other action under any law and/or regulation administered by the U. S. Environmental Protection Agency. Nothing contained in the Final Order portion of this Consent Agreement

and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

7. Each party shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement and Final Order.

8. Each signatory of this Agreement certifies that he or she is fully authorized to enter into the terms of this Consent Agreement and Final Order.

9. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of a mitigated civil penalty. Respondent understands that its failure to timely pay any portion of the mitigated civil penalty, may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties, late payment handling charges, and accumulated interest. In such case, interest shall accrue thereon at the applicable statutory rate on the unpaid balance until such civil penalty and any accrued interest are paid in full. A late payment handling charge of $15 will be imposed after thirty (30) days and an additional $15 will be charged for each subsequent thirty (30) day period. Interest shall accrue thereon at the rate determined by the Secretary of the Treasury (currently three percent (3%) per annum for the period January 1, 2009, through December 31, 2009) on the unpaid balance until such civil penalty and accrued interest are both paid in full.

Additionally, as provided by 31 U.S.C. § 3717(e)(2), a six percent (6%) per annum penalty (late charge) may be assessed on any amount not paid within ninety (90) days of the due date.

10. Respondent, in settlement of the allegations set forth in the Consent Agreement, shall pay by cashiers or certified check, a civil penalty, for the violations cited herein, in the amount of Five Hundred Dollars ($500.00). Payment will be made within thirty (30) days of the effective date of this Order. The payment shall be identified as "In the Matter of Krusemark Ag, Inc.," and reference the docket number.

11. Payment of the penalty shall be by cashier or certified check made payable to "Treasurer, United States of America" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

12. The payment shall reference Docket Number FIFRA-07-2009-0026 and "In the Matter of Krusemark Ag, Inc." Copies of the check shall be forwarded to:

Kent Johnson
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101; and

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.

13. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

14. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

15. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas, 66101.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

By: /s/ [Illegible]
for William A. Spratlin
Director
Water, Wetlands, and
Pesticides Division

Date: 11/25/09

By: /s/ Kent Johnson
Kent Johnson
Attorney
Office of Regional Counsel

Date: 11/23/09

RESPONDENT:
KRUSEMARK AG, INC.

By: /s/ Bret Krusemark

Title: Vice-Pres

Date: 11/20/09

IT IS SO ORDERED. This Order shall become effective immediately.

/s/ Robert L. Patrick
ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental
Protection Agency, Region 7

Date: December 1, 2009

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

Kent Johnson
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Brent Krusemark, Vice President
Krusemark Ag, Inc.
58395 849th Road
Pender, Nebraska 68047

Dated: 12/1/09

/s/ Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7

EXHIBIT B

[SEAL] Region 7
You are here: EPA Home About Region 7 Facts sheets. Fact Sheets Discharge Permits for Concentrated Animal Feeding Operations, Omaha and Winnebago Reservations, Nebraska

Fact Sheet

December 2007

Discharge Permits for Concentrated Animal Feeding Operations, Omaha and Winnebago Reservations, Nebraska

Site Background

National Pollutant Discharge Elimination System (NPDES) permits to discharge wastewater to waters of the United States are issued under Section 402 of the Clean Water Act (CWA), 33 U.S.C. Section 1342, subject to certain effluent limitations and other conditions.

Eight concentrated animal feeding operations (CAFOs) located within the exterior boundaries of the Omaha Tribe of Nebraska Reservation and/or the Winnebago Tribe of Nebraska Reservation applied to EPA for NPDES permits. Under the CWA regulations, 40 C.F.R. Section 123.1(h), EPA issues permits to facilities discharging in Indian country.

On July 19, 2007, EPA proposed to issue eight draft NPDES permits, and a public comment period was

announced and opened for 30 days. EPA received timely comments and a request for a public hearing.

Tentative Decision

EPA tentatively proposes to issue final NPDES permits to five CAFOs located within the Omaha or Winnebago Indian reservations: Bruns Feedlot, LLC, Circle T Feedlot, Inc., Morgan Feedlot LLC, Sebade Feedyard, and Stanek

Brothers. EPA proposes to delay issuance of three draft NPDES permits: Ron Bruns Feed Yards, Eastplace; Ron Bruns Feed Yards, Homeplace; and LBBJ, Inc. At a later date, EPA may propose to issue the final NPDES permits for these three CAFOs after deciding on the location of the Omaha Reservation's western boundary.

Public Hearing December 13

EPA has scheduled a public hearing to solicit comments on a tentative decision to issue five and delay issuance of three draft NPDES permits.

EPA has scheduled the hearing for **December 13, 2007, from 6:30 to 8:30 p.m. Central time at the Marina Inn Conference Center, 4th and B Streets, South Sioux City, Nebraska**. Participants will have an opportunity to submit oral or written comments at the hearing.

EPA has extended the public comment period and continues to seek **written comments** regarding the proposed actions. Comments must be mailed and date-stamped no later than **December 14, 2007**. Send comments to: Pradip Dalal, P.E., Chief, Waste Water & Infrastructure Management Branch, EPA Region 7, 901 N. Fifth St., Kansas City, KS 66101.

Additional Information

The facilities' administrative records are available at the following locations during normal business hours:

EPA Region 7 Records Center
901 N. Fifth St.
Kansas City, KS 66101

House Memorial Library
220 Thurston Ave.
Pender, NE 68049

Neb. Indian Community College Library
1 College Hill Road
Macy, NE 68039

Little Priest Tribal College Library
601 E. College Drive
Winnebago, NE 68071

Questions or requests for information can be submitted to:

Donna Porter, CAFO Coordinator
Waste Water & Infrastructure Management Branch
EPA Region 7
901 N. Fifth St.

Kansas City, KS 66101
Phone: 913-551-7929
Toll-free: (800) 223-0425
E-mail: porter.donna@epa.gov

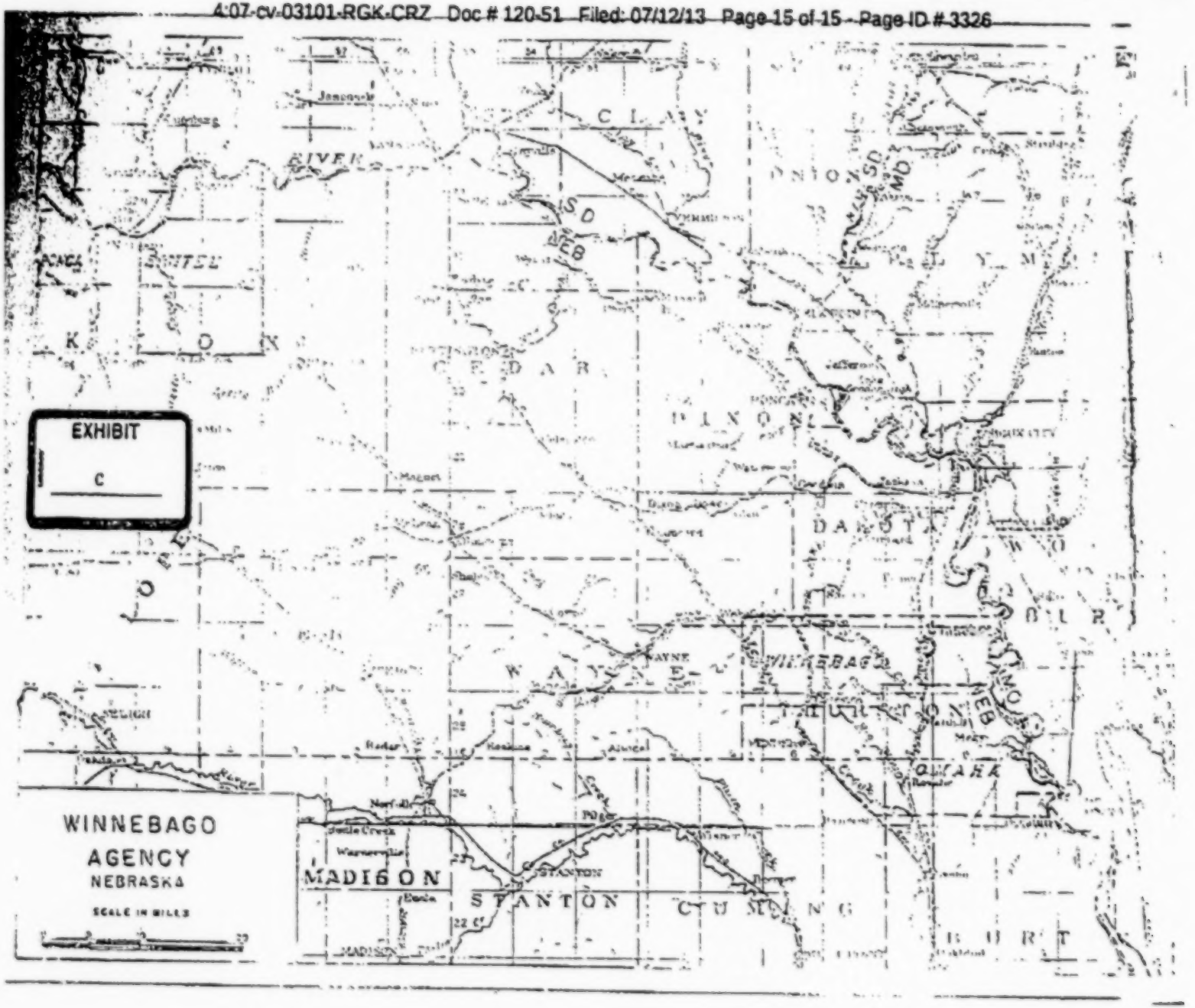


EXHIBIT
C
WINNEBAGO
AGENCY
NEBRASKA
SCALE IN MILES
CLAY
UNION
CEDAR
DIXON
DAKOTA
WAYNE
WINNEBAGO
MADISON
STANTON
CUMING
BURT
DAKOTA

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

THE VILLAGE OF PENDER, NEBRASKA, et al., Plaintiffs, v. MITCHELL PARKER, et al., Defendants.	Civil Action No. 4:07CV3101 **DECLARATION OF THOMAS SAUNSOCI**

STATE OF NEBRASKA)
) ss.
COUNTY OF THURSTON)

I, Thomas Saunsoci, being first duly sworn under oath, state and allege as follows:

1. My name is Thomas Wayne Saunsoci. I am competent to testify about the matters set forth herein and do so from personal knowledge.

2. In approximately October of 2011, I was arrested and charged with a probation violation in the County Court of Thurston County, Nebraska. I was held in custody with the condition that I could not be released unless I paid a bond.

3. A close personal friend came to the Thurston County Jail in Pender with a sufficient amount of money to bail me out. The jailer said that she/ Thurston County could not accept the money without

my signature appearing on a document called a "Waiver of Extradition." A copy of that executed document is attached.

4. I had no choice but to sign this document in order to gain my freedom from the Thurston County Jail.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this day 10 of August, 2012.

/s/ Thomas Saunsoci, Sr.
Thomas Wayne Saunsoci

IN THE COUNTY COURT OF
THURSTON COUNTY, NEBRASKA

STATE OF NEBRASKA Plaintiff, vs. Defendant	)))))	CASE NO. _____ WAIVER OF EXTRADITION

I, Thomas Saunsoci, do solemnly swear and hereby agree, upon release on bond in the above Captioned case, I waive any and all rights of extradition I may have wherever I may be located, whether that be in the State of Nebraska, on reservation lands, or whether it any foreign jurisdiction whatsoever. I further agree to comply with all conditions of bond

and that I shall appear for all Court proceedings in Thurston County, Nebraska in the above captioned case. I further promise that in the event I fail to appear for any court proceeding in the above captioned case, that I will use all reasonable means at my disposal to dissuade the Omaha tribe from preventing, in any way, my return to Thurston County, Nebraska.

Thomas Saunsoci Defendant
Printed name

Thomas Saunsoci
Signature of Defendant

SUBSCRIBED AND SWORN to before me this 25th day of October 20~~0~~11

/s/ Shelly K. Perez
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

EXHIBIT A

[SEAL] United States Department of the Interior

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
686 Federal Building, Fort Snelling
Twin Cities, Minnesota 55111

BIA.TC.2969 June 27, 1989

Jerry Jaeger
Area Director
Bureau of Indian Affairs
Aberdeen Area Office
Attn: Land Title and Records Office
115 Fourth Avenue Southeast
Aberdeen, South Dakota 57401

Re: Survey of Western Boundary of Omaha Reservation

Dear Mr. Jaeger:

Earlier this year the question of locating the western boundary of the Omaha Reservation was submitted to this office. An opinion was requested in order to facilitate a survey contracted by the Omaha Tribe to the Bureau of Land Management (BLM).

After several telephone conversations with the representative of BLM in Cheyenne, Wyoming, my understanding is that the survey can and will be scheduled for this fall.

In order to offer an opinion on where the boundary is situated each of the treaties or legislative acts effecting the reservation will be examined in chronological order and evaluated in light of current case law.

Treaty of 1854 (concluded 3-16-54 and proclaimed 6-21-54)

In 1854 the Omahas relinquished all claims to the south and west of line described in the treaty subject to the provision that if the land set aside for them was unsuitable, then the President could assign land in lieu of the described area not to exceed 300,000 acres.

Article 14 of that treaty provided that:

> The Omahas agree that all the necessary roads, highways, and railroads; which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefore in money.

The 1854 treaty did not make any specific grants to railroads or for highways, but it did pave the way for future, more specific grants.

1855: Land in Lieu of 1854 treaty

The Omaha Indians were dissatisfied with the land selection in the 1854 treaty and refused to make a

selection anywhere other than at Black Bird Hills. The Commissioner recommended that the selection be confirmed and Secretary McClelland confirmed it on May 11, 1855.

1865 Treaty with the Omaha, 14 Stat. 667

In the 1865 treaty the Omaha Indians agreed to "cede, sell, and convey to the United States a tract of land from the north side of their present reservation . . . ".

The conveyance used specific language which clearly showed that the Omaha's were relinquishing the title to the Land in exchange for a sum certain, $50,000. (The importance of specific conveyance language and a sum certain are discussed under the 1882 Act.) Article 5 explained that the Government was purchasing the described tract for the purpose of locating the Winnebago Tribe on it.

Thus, the 1865 treaty clearly diminished the Omaha Reservation and by 14 Stat., 671 created the Winnebago Reservation.

1872 17 Stat., 391 An Act for the Relief of Certain Tribes of Indians in the Northern Superintendency.

This Act provided for the survey, appraisal and sale of the western part of the Omaha Reservation not to exceed 50,000 acres. The Act in Article 1 provides that the part "to be surveyed was to be separated from the

remaining portion of said reservation by a line running along the section lines from north to south."

Although the argument may be advanced by the Tribe that the Omahas only authorized the Secretary of the Interior to act as their land agent the effect of the 1872 Act was at least a de facto diminishment. The distinct line of separation also adds to the diminishment argument.

(Diminishment will be discussed more thoroughly under the 1882 Act).

1880 Agreement of April 19, 1880 with Sioux City and Nebraska Railroad Company.

The agreement allowed the Sioux City and Nebraska Railroad Company to survey a line (not two) through the reservation along a route more particularly described in the Act. The railroad was to compensate the Tribe seven dollars per acre for the land so taken and in exchange was to receive a right of way not to exceed 200 feet in width across the reservation.

1882: Act of August 7, 1882, 22 Stat., 341.

The 1882 Act is the primary act which is involved in the question of the location of the western boundary. The Act authorized the Secretary to survey and sell "all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company . . . " After the survey and appraisal, the

Secretary was authorized to proclaim the unallotted lands "open for settlement." The Act did not appropriate a sum certain to compensate the tribe, but rather provided that "no portion, of said land, shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre . . ."

The lands involved in the sale were all located to the west of the railroad right of way except for township 24 which is adjacent to the right of way to the east. In a provision of Article 2, the following language directs the disposition of township 24:

> That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

The above language places township 24 in the same position as other lands and therefore its fate is tied to the lands to the west of the railroad right of way.

The initial question in deciding the western boundary is did the 1882 Act diminish the Omaha Reservation. The factors to be considered in diminishment cases are explained in *Solem v. Bartlett*, 465 U.S. 463 (1984). That case dealt with the opening of the Cheyenne River Sioux Reservation in South Dakota. The Supreme Court held that the Act which opened the northwestern portion of the reservation did not diminish the reservation and left the exterior boundary in tact.

As the Court in *Solem* noted:

> The most probative evidence of congressional intent is the *statutory language* used to open Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. (Emphasis added).

The operative statutory language in the 1882 Omaha Act is that "the Secretary of the Interior be, and he hereby is authorized to cause to be surveyed, if necessary, and sold . . . " That language fails to demonstrate a clear intent to divest from the reservation all unallotted lands. When compared with the language of other cases dealing with possible diminishment, the Omaha language leads to the conclusion that *on the basis of the language alone* diminishment was not the intent of Congress. In a case in which the Supreme Court found diminishment, *DeCoteau v. District Count Court*, 420 U.S. 425 (1975), the language of the act involved said that the Lake Traverse Indian Tribe agreed to "cede, sell, relinquish and convey" all interest in unallotted land. (This language is similar to the language in the 1865 Omaha Treaty.) The language used to open the western portion of the Omaha Reservation under the 1882 Act is more like the language in *Seymour v. Superintendent*, 368 U.S. 351 (1962) in which the Secretary was authorized "to sell or dispose of" unallotted lands on a portion of the

Colville Indian Reservation. The Supreme Court found no diminishment in *Seymour*.

Another of the factor considered by the Supreme Court in *Solem* was the payment of a sum certain to the tribe to compensate for lands ceded.

> When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished.
>
> *Solem* 465 U.S. at 470-471.

The Omaha Act did not contain a provision that a sum certain was authorized or appropriated by Congress. The Act at Section 2 provided that "no portion of said land shall be sold at less than the appraisal valve thereof and in no case for less than two dollars and fifty cents per acre."

The compensation provision is similar to the language noted in *Solem* in which the Court said, "This reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the tribe's sales agent." *Solem*, 465 U.S. at 473.

After considering these factors, clear language of cession and sum certain compensation, the Tribe could certainly claim that the intent of the 1882 Act was to open the reservation for non-Indian settlement

but not to diminish it. However, the Court in *Solem* also acknowledges that de facto diminishment or diminishment in fact may exist regardless of Congressional intent.

> Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred. (cites omitted.) In addition to the obvious practical advantage of acquiescing to de facto diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.
>
> *Solem*, 465 U.S. at 472.

From the information currently available to this office, the Omaha situation presents a set of facts from which a court could easily find de facto diminishment. According to the referral memo, no Indian trust allotments were made on lands lying *west* of the Sioux City and Nebraska Railroad right of way. That land appears to have lost its Indian character long ago with the arrival of non-Indian homesteaders. The Title and Records Office also noted that only a few parcels of township 24 which was opened for settlement in the same manner as the land to the west of railroad right of way, remain in trust.

An additional bit of information which could be used to point to the intention to diminish the reservation

or to accelerate de facto diminishment is the Act of May 15, 1888, 25 Stat., 150 which was one of several acts which extended the time of payment for those settlers purchasing the land. That Act at Section 3 provided that if purchasers defaulted, that land was to be sold at public auction. The possibility of the land reverting to the Tribe did not surface and thus the Act adds credence to the conclusion that the original Congressional intent was to divest the tribe of all interest in the land to the west of the railroad right of way or at least, that Congress intended that most or all of the land would be sold to non-Indian settlers.

Based upon the available information regarding the area and the past court decisions regarding diminishment, I believe that the Omaha Act of 1882 does *not* present a good set of facts to argue against de facto diminishment.

1899: An Act Authorizing Sioux City and Omaha Railroad Co to Construct and Operate a Railroad

The Act of Feb. 28, 1899, 30 Stat., 912 contains the reverter language at issue and directs the railroad company not to sell the lands. More specifically, the Act provides:

> . . . (t)hey shall not be used except in such manner and for such purposes as are necessary for the construction and convenient operation of said railway, telegraph, and telephone lines; and when any portion thereof shall cease to be used, such portion shall revert to the Omaha and Winnebago tribes of

> Indians from whom the same shall have been taken.

Although the above language exists, I believe that a court would *not* find that Congress intended the reversion of a fee interest in the land to the tribe. The factors which lead to that conclusion are the date of the right of way act and the more general judicial aversion to the creation of small strips of fee land controlled by "remote dedicators", *United States v. Drumb*, 152 F 2d 821, 823 (10th Cir. 1946).

The interpretation of government grants to railroads is dependent upon the date of the land grant. As a very general rule the grants which occurred prior to 1871 have been found to be grants or conveyances of fee or limited fee interests and those which occurred after 1871 have been found to be easements. The historical perspective of the railroad land grants is explained in *Great Northern Railroad Co. v. United States*, 315 U.S. 262 (1941).

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor which was crystalized in the following resolution adopted by the House of Representatives on March 11, 1872 . . .
>
> *Great Northern*, 315 U. S. at 273.

The resolution to which the Court referred discontinued the policy of granting subsidies in public lands to railroads.

The Great Northern case dealt with a conveyance under the general railroad right of way statute, the Act of March 3, 1875. The Court found that the Congress had only granted an easement, not a fee, when a right of way was granted through public lands.

The general rule that grants to a railroad for a right of way to be used for railroad purposes are considered to be easements rather than conveyances of ownership in fee simple was repeated by the courts (*McDonald v. U.S.*, 119 F.2d 821 (9th Cir. 1941) and by those charged with administrative interpretation of such grants. A brief history of the administrative interpretation of the 1875 general right of way act is outlined in the *Great Northern* case in which the Court noted that the position that an easement rather than a fee was granted was supported by administrative publications of 1888, 1892 and 1898. A recent Departmental memorandum also confirms the status of pre-1871 rights of way as fee or limited fee interests and later grants as easements. Enclosed please find a copy of the January 12, 1989 memo from the Office of the Solicitor regarding MCI and the Southern Pacific Railroad right of way.

In addition to the preceding legal analysis, this office has had some practical experience in a case involving a grant with reverter language which involved a right of way across tribal lands. In 1981, the Department of Justice, in a matter involving the reversion of a 1894 right of way grant across the Leech Lake Reservation in Minnesota, *declined* to file the complaint which

would have sought return of the right of way to the tribe. A copy of that letter is enclosed for your information. That matter also involved a grant which contained language by which the right of way, if abandoned or no longer used for railroad purposes would revert to the tribe. The Department of Justice's rejection of that case leads to the conclusion that such a request on behalf of the Omaha Tribe would meet the same fate.

If the right of way strip did not revert to the tribe, then it will or has reverted to the adjacent landowners. That position was expressed by the July 27, 1959 letter from the Commissioner of Indian Affairs to the Superintendent of the Winnebago Agency.

In *Drumb*, 152 F.2d 821 (10th Cir. 1946), the court explained that absent a clear showing of a contrary intention by Congress regarding Indian land, then the general rule that land reverts to the adjacent landowner applies. "Under this rule, upon abandonment of a right of way while the adjoining land was in the Tribe, the strip of land would revert to the abutting property and belong to the Tribe. If in the meantime the Tribe had disposed of the land, it would follow the land." *Drumb*, 152 F.2d at 824. Absent some particular showing in this case, the land reverted to the adjacent landowner as explained in the 1959 letter.

Regardless of where the fee interest currently rests, the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned railway right of way. Based upon

the analysis explained above, under the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for settlement.

Whether a court would eventually find de jure or de facto diminishment, I believe that diminishment would be found to the center of the right of way because it was the line which was used to distinguish land available for sale (western side and township 24) from land to be patented to tribe following the allotment process (eastern side).

The questions regarding the possibility of Indian homesteads in the western portion or the reasons behind the total lack of Indian allotments on the western portion are interesting questions from a historical point. However, they do not impact on the current question of the most probable location of the boundary.

If this office may provide further assistance, please let me know. In your discretion, a summary or copy of this letter could be provided to BLM in Cheyenne, Wyoming (Attn: Jerry Messick) to facilitate the scheduling of the BLM survey.

Sincerely,
/s/ Marcia M. Kimball
Marcia M. Kimball
For the Field Solicitor

Enclosure

MMK/bt
cc: Winnebago Agency – Don Whitener

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

United States Department of the Interior

[SEAL] OFFICE OF THE SOLICITOR
Office of the Field Solicitor
Bishop Henry Whipple Federal Building
1 Federal Drive, Room 686
Ft. Snelling, Minnesota 55111-4030

BIA.GPRO.20080342 April 24, 2008

Alice Harwood
Acting Regional Director
Great Plains Region
Bureau of Indian Affairs
115 Fourth Avenue S.E.
Aberdeen, SD 57401

Re: *Omaha Indian Reservation Boundary*

Dear Ms. Harwood:

In 2007, *Smith v. Parker*, Case No. 4:07-CV-03101, D NE, was brought in the United States District Court for the District of Nebraska. Plaintiffs bringing the suit are owners of businesses selling alcoholic beverages in the Village of Pender, Nebraska. The Village of Pender is situated on land located to the west of the original Sioux City and Nebraska railroad right of way. The question has arisen over whether Pender is within the boundaries of the Omaha Indian Reservation. Rather than complying with the Omaha Tribe's federally approved ordinance requiring a tribal liquor license, the Plaintiffs sued to

restrain the Tribe from enforcing the ordinance against them, claiming that the Village of Pender is no longer part of the Omaha Indian Reservation because it was diminished by Congress. On October 4, 2007, the district court stayed the case in order for the parties to exhaust their remedies in the Omaha Tribal Court. This matter is currently being litigated in Omaha Tribal Court, referred to as *Village of Pender v. Parker*, Civ. No. 08-002.

On January 24, 2008, the Twin Cities Field Solicitor's Office received a memorandum from the Great Plains Regional Director. The subject line to the memorandum is captioned "Omaha Tribe request for Attorney Fees," however, the body of the memorandum states that Omaha Tribal Resolution No. 08-27 formally requests that legal services be provided by the United States as trustee. The purpose of this letter is to summarize our analysis to date and remand the matter back to the Great Plains Regional Office with a recommendation that a tribal request for litigation support funds receive prompt and favorable attention, if possible.

Your letter implicitly requests reconsideration of the 1989 opinion issued by this office. As explained herein, we believe that the development of caselaw on diminishment and disestablishment undermines the reasoning of that opinion and that it should therefore be reconsidered upon receipt of additional substantive information.

Analysis

Reservation Status

I. Canons of Construction for Diminishment/ Disestablishment

The Supreme Court has developed a voluminous body of case law addressing the disestablishment or diminishment of Indian reservations. To date, the United States Supreme Court has decided seven cases establishing the legal standard for finding diminishment or disestablishment.[1]

In the unanimous *Solem v. Bartlett* decision, the Supreme Court held:

> The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

Solem v. Bartlett, 465 U.S. 463, 470 (1984) (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Diminishment "will not be lightly inferred" and

---

[1] *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).

"requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found." *Id.* (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)). Indeed, congressional intent to diminish a reservation must be "clear and plain." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citing *United States v. Dion*, 476 U.S. 734, 738-39 (1986)).

The Supreme Court has developed a test to assess congressional intent: 1) "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands," *Solem*, 465 U.S. at 470; 2) the courts also look to legislative history and the surrounding circumstances of a surplus land act in order to determine the "contemporaneous understanding" of the act's purpose and effect, *id.* at 471; and 3) to a lesser extent, events after the passage of a surplus land act may be examined "to decipher Congress's intentions," *id.* at 471-72 (looking to Congress's treatment of the affected areas, the manner of treatment by Bureau of Indian Affairs and local judicial authorities, as well as who settled in the area and subsequent demographic history).

Diminishment or disestablishment requires clear and unambiguous language that expressly changes a reservation's boundary. *See United States v. Dupris*, 612 F.2d 319, 320-22 (8th Cir. 1979). An "isolated phrase in [a statutory section] having nothing to do with the location of reservation boundaries falls short of 'clear language of express disestablishment.'" *Lower Brute Sioux Tribe v. South Dakota*, 711 F.2d

809, 819 (8th Cir. 1983) (quoting *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)).

This analysis must be informed by a controlling canon of statutory construction: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). It was further explained in the *Dion* case in the related context of abrogation of treaty rights, "[w]hat is essential is clear evidence that Congress *actually considered the conflict* between its intended action on the one hand and Indian treaty rights on the other and *chose to resolve the conflict by abrogating the treaty*." *Dion*, 476 U.S. at 739-40 (emphasis added).

A) Part 1 – Statutory Analysis

The Supreme Court indicates that certain kinds of statutory language reflect strong evidence of diminishment.

> The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests [diminishment] . . . When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable

> presumption that Congress meant for the tribe's reservation to be diminished.

Solem, 465 U.S. at 470-71. Typically, the explicit cession language employed by Congress is "cede, sell, relinquish and convey" as opposed to "sell and dispose." *Id.* at 473. However, in *Hagen v. Utah*, the Court found that Congressional use of the phrase "restored to the public domain," in the operative language of a surplus land act, evidenced a Congressional purpose to terminate reservation status. *See* 510 U.S. at 400, 414.

In addition to reviewing cession language, courts will look to, among other things, whether there was a sale of the lands; if there is language providing for the sale of undisposed lands for a sum certain amount of cash after a certain period; if there was a provision for in-lieu allotments; whether there was language reserving land for a state school; whether there was homestead and township language; and if liquor laws were enacted. Courts look for intent to diminish on the face of the relevant statute.

With this guidance, below we will analyze all of the treaties and statutes pertaining to the Omaha Indian Reservation.

I) Treaties and statutes pertaining to the Omaha Indian Reservation

Treaty with the Omaha, 1854, 10 Stat. 1043, ratified April 17, 1854, proclaimed June 21, 1854

In 1854, the Omahas *ceded* to the United States "all their lands west of the Missouri River, and south a line drawn due west from a point in the centre of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line . . . " Art. 1, 10 Stat. 1043. The treaty contained a provision that if the land set aside was unsuitable, the President could "set apart and assign to them, within or outside of the ceded country, a residence suited and acceptable to them." *Id.* "In consideration of and payment for the country herein ceded, and the relinquishments herein made," the United States agreed to pay the Omahas several sums of money; including $40,000 per annum for three years; $30,000 per annum for the next ten years; $20,000 per annum for the next 15 years; and $10,000 per annum for the next 12 years. Art. 4, 10 Stat. 1043. Thus, with the cession language and a sum certain amount provided for, this treaty appears to have caused a complete relinquishment of all claims of the Omaha to land south and west of the line described in the treaty and formally established the new Omaha Indian Reservation.

In addition, Article 14 of the treaty provided:

> The Omahas agree that all the necessary roads, highways, and railroads, which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money.

Importantly, the 1854 Treaty did not make any specific grants for roads, highways, or railroads. Therefore, this language merely mentions that roads, highways, and railroads might be constructed through the Omaha Reservation at some point in the future.

Treaty with the Omaha, 1865, 14 Stat. 667, ratified Feb. 13, 1866, proclaimed Feb. 15, 1866

In 1865, the Omaha Tribe agreed to "*cede, sell, and convey* to the United States a tract of land from the north side of their present reservation" described as "commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River, and thence south along the river to the place of beginning." Art. 1, 14 Stat. 667. The Omaha Tribe was to "vacate and give possession of the lands ceded by this treaty

immediately after its ratification." *Id.* In consideration of the cession, "the United states agreed to pay to the said Omaha tribe of Indians the sum of *fifty thousand dollars* . . . for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation." Art. 2, 14 Stat. 667. Further consideration included extending the provisions of the 1854 Treaty providing payments for an additional ten years as well as the payment of damages. *See* Art. 3, 14 Stat. 667. The "remaining portion of their present reservation" was to be cultivated and improved for individual use and benefit by assigning to each head of a family up to 160 acres of land. Art. 4, 14 Stat. 667. It was stated that the "whole of the lands, assigned or unassigned, in severalty, shall constitute and be known as the Omaha reservation. *Id.* Finally, it was noted that the "object of the Government in purchasing the land . . . is for the Purpose of locating the Winnebago tribe thereon." Art. 5, 14 Stat. 667. If this proved detrimental to the peace, quiet, and harmony of the white's or tribes, the Omahas were given "the privilege of repurchasing the land." *Id.*

This treaty established the Winnebago Reservation and reestablished a new Omaha Indian Reservation in the same location minus certain lands set aside for the Winnebago. The treaty contained language evidencing a relinquishment of title to the land in exchange for a sum certain amount.

An Act for the Relief of Certain Tribes of Indians in the Northern Superintendency, 1872, 17 Stat. 391, June 10, 1872

In 1872, in one section of an act involving several Indian tribes, Congress provided for a survey of a portion of the Omaha Indian Reservation "not exceeding fifty thousand acres, to be taken from the western part thereof and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south." Sec. 1, 17 Stat. 391. After a survey and appraisement, the Secretary of the Interior was "authorized to offer the same *for sale for cash in hand*; and sealed proposals, duly invited by public advertisements." *Id.* No bids would be accepted for *less than the appraised value or less than one dollar and twenty-five cents for acres* or, for the entire tract, *less than aggregate appraised value nor less than one dollar and twenty-five cents per acre. Id.* The proceeds from such sale were to be "placed to the credit of said Indians on the books of the Treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually" except for funds deemed "necessary to be expended for their immediate use in improving and fencing farms, building houses, purchasing implements of agriculture and livestock, and in establishing and supporting schools." *Id.* All the patents of lands sold under authority of this act were to include a clause forever prohibiting the sale of intoxicating liquors on the land. *See* Sec. 5, 17 Stat. 391.

Generally, this act authorized the Secretary to survey and offer for sale land on the western part of the Omaha Indian Reservation. This act contains none of the language which signals a diminishment or disestablishment. In fact, the language in the 1872 Act is similar to language in the act cited in *Seymour*, 368 U.S. at 355, which the Supreme Court determined did not result in diminishment. In *Seymour*, the Court could not find any specific language expressly vacating the reservation and restoring that land to the public domain. To the contrary, the Court found the statute repeatedly referred to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such. *Id.* at 355. In *Seymour*, the Court noted that the act provided that the proceeds from the disposition of lands affected by its provisions shall be "deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington. . . ." *Id.* The Court held that the act "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting us guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Id.* at 356.

The 1872 Act said that after a survey and appraisement, the Secretary was "authorized to offer the same *for sale for cash in hand*; and sealed proposals." There was no sum certain amount give,

instead, it was stated that no bids would be accepted for less than the appraised value or less than one dollar and twenty-five cents for acres or, for the entire tract, less than aggregate appraised value nor less than one dollar and twenty-five cents per acre. Similar to the facts in *Seymour*, the proceeds from the sale were to be "placed to the credit of said Indians on the books of the Treasury of the United States, and bear interest at the rate of five per centum per annum, payable semi-annually" except for funds deemed "necessary to be expended for their immediate use in improving and fencing farms, building houses, purchasing implements of agriculture and live stock, and in establishing and supporting schools." Clearly, it was contemplated that the Omahas would remain in the vicinity to take advantage of the improvements to their land.

All of this appears to evidence a simple sale of property for the Tribe's benefit without contemplating that the reservation would cease to exist in this particular area. The Secretary of the Interior appears to have been acting as the land agent to perfect the sale. There was no requirement that the Omaha tribal members vacate the land to the west nor any discussion of what happens to the land that is not sold. The sale of the Omaha tribal lands was contained in one section and the sale of a variety of other tribal lands were also provided for in the treaty. *See* Sections 2-4, 17 Stat. 391.

Following reasoning in the *Rosebud* and *Yankton* diminishment cases, the provision "forever prohibiting"

the sale of intoxicating liquors on the sold land might lend support to a conclusion that Congress included the liquor prohibition since the land would cease to be part of the reservation. At this time, through various statutes, liquor had been outright banned from Indian country. The Trade & Intercourse Act of 1834 and other statutes established a framework of prohibitions and enforcement measures to address the prohibition of liquor in Indian country. *See* Act of June 30, 1834, ch. 161, § 21, 4 Stat. 729, 732-33 (current version at 25 U.S.C. § 251); Act of July 23, 1892, 27 Stat. 260. In *Dick v. United States*, 208 U.S. 340, 359 (1908), the Supreme Court reasoned that Congress was entitled to attach liquor prohibitions, reasonable in duration, on non-Indian land which Indians were likely to frequent. In *Yankton*, the court found that since Congress had already banned all liquor from Indian country, a provision prohibiting liquor on land separated via a sale from an Indian reservation could signal that Congress intended that the land would not remain part of the reservation. Thus, the Supreme Court concluded that Congress was being cautious about protecting the Indians from harmful contact with liquor by also banning it on portion of land sold from the reservation. However, the statutory language being reviewed in *Yankton* was more specific regarding the liquor prohibition and contained jurisdictional distinctions between reservation and ceded land, differing from the facts in the Omaha case. In addition, the Court in *Solem* specifically noted inferences from liquor prohibition provisions were "obviously of secondary importance to

[the] decision . . . Moreover, as independent evidence of a congressional intention to diminish, such evidence is suspect." *Solem*, 465 U.S. at 476.

> *An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes, 22 Stat. 341, August 7, 1882*

In 1882, Congress again authorized the Secretary of the Interior to *survey and sell* "all that portion of their reservation in the State of Nebraska lying west of the right of way gained by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty." Sec. 1, 22 Stat. 341. After the survey and appraisal of the lands, the Secretary was authorized to "issue a proclamation to the effect that unalloted lands are open for settlement under such rules and regulations as he may prescribe." Sec. 2, 22 Stat. 341. After the proclamation, any bona fide settler occupying the land could purchase the land, not to exceed 160 acres in each case. *Id.*

No specific sum certain was guaranteed in the act. Instead, it stated "no portion of said land shall be sold at *less than the appraised value, and in no case for less than two dollars and fifty cents per acre*." Id. It further provided "all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall

be appraised and sold as other lands under the provisions of the act." Id. The proceeds of the sales were to be "placed on the credit of said Indians in the Treasury of the United States, and shall bear interest. . . ." Sec. 3, 22 Stat. 341.

After complying with all provisions in the act, patents were to be "issued as in the case of public lands offered for settlement under the homestead and preemption acts." Sec. 4, 22 Stat. 341. However, this section contained a provision which stated that "*any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.*" Therefore, any land provided to individual Omaha tribal members in the western portion of the reservation would have been unaffected by this act.

The act went on to provide for the allotment of the eastern portion of the reservation. *See* Sec. 5, 22 Stat. 341. The remaining land on the eastern portion was to be patented to the Omaha Tribe. *See* Sec. 8, 22 Stat. 341. Section 8 included an additional provision that provided "said Indians or any part of them may, if they shall so elect, select the land which shall be allotted them in severalty in *any part of said reservation either east or west of said right of way mentioned in the first section of this act.*" *Id.*

This act does not contain statutory language exhibiting a clear and unambiguous intent to diminish the Omaha Indian Reservation but instead, appears to provide for the sale of land. Section 4 of the act clearly states that any right in severalty

acquired by an Indian under an existing treaty would not be affected by the 1882 Act. While this information is not included in the administrative record before us, it is possible that there were allotments made to Omaha Indians on this land in the western portion of the reservation. Most important, the 1882 Act expressly authorized certain Omaha Indians to select allotments from the land to the east of the right of way. *See* Sec. 5, 22 Stat. 341. However, in discussing allotments for Omaha children born during and prior to expiration of the land being in trust (25 years), Section 8 specifically provided that these Omaha Indians could elect to receive allotted land "in any part of the reservation either *east or west of said right of way*." These facts support a conclusion that Congress intended the land to the west to remain the reservation of the Omaha.

Once again, the language of the 1882 Act appears to be similar the language in the act examined in *Seymour*, in which the Supreme Court found no diminishment. More recently, the Supreme Court has stated:

> In both *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 355 (1962), and *Mattz v. Arnett*, 412 U.S. 481, 501-502 (1973), we held that Acts declaring surplus land "subject to settlement, entry, and purchase," without more, did not evince congressional intent to diminish the reservations. Likewise, in *Solem*, we did not read a phrase authorizing the Secretary of the Interior to "sell and dispose" of surplus lands belonging

> to the Cheyenne River Sioux as language of cession. *See* 465 U.S. at 472. In contrast, the 1894 Act at issue here – a negotiated agreement providing for the total surrender of tribal claims in exchange for a fixed payment – bears the hallmarks of congressional intent to diminish a reservation.

South Dakota v. Yankton Sioux Tribe, 522 U.S. at 345. The 1882 Act does not contain any language expressly vacating the land or restoring the land to the public domain. The Omaha Indians were not asked to vacate the land west of the rights of way, and instead, were simply selling some excess land for a profit.

There was no exchange for payment of a "sum certain" amount in which the Supreme Court has pointed at to show a congressional intent to diminish reservation boundaries. Instead, the Secretary was directed to sell the opened land for no less than $2.50 per acre. The proceeds of the sale were to be placed on the credit of the Omaha Indians in the U.S. Treasury and bear interest at the rate of five per centum per annual which was to become annual income for the Omaha Indians. While in *DeCoteau*, 420 U.S. at 443, 448, the Supreme Court held diminishment had occurred when an act authorized the Secretary to sell the land for no less than $2.50 per acres, that act also expressly authorized the cession and relinquishment of all the tribe's "claim, right, title, and interest in the unallotted lands." *Id.* There is no such language in the 1882 Act.

The 1882 Act did not provide for a complete cession and relinquishment of the reservation nor did it restore the land to the public domain. It did not compensate the Omaha Tribe with a sum certain amount. Nor did it require the Omaha to vacate the opened land. It created a trust account for the benefit of the Indians. All of this weighs toward finding that the 1882 Act was simply authorizing the sale of surplus reservation land and the allotment of land within the entire reservation to tribal members and does not appear to have been intended to diminish the Omaha Reservation boundaries.

Act of March 3, 1893, c. 209, 27 Stat. 612, 630

In 1893, Congress amended the 1882 Act to authorize the Secretary, with the consent of the Omaha Tribe, to allot in severalty through an allotting agent to each Indian woman and child of the tribe born since allotments of land were made under the provisions of the 1882 Act. Each individual was to be given one eighth of a section of the residual lands held by the Tribe in common. In addition, previous allotments of one sixteenth were to be increased an additional one sixteenth.

Nothing in this statutory language provided a complete cession or relinquishment of the reservation. It did not provide compensation to the Omaha Tribe in a sum certain amount. It did not require the individuals to vacate any opened land. Instead, it

further promoted the allotment of the reservation to tribal members who missed out during the earlier allotment.

Act of August 2, 1886, 24 Stat. 214; Act of May 15, 1888, 25 Stat. 150; Act of August 11, 1894, 28 Stat. 276

On several occasions, Congress enacted legislation authorizing the Secretary of the Interior to extend the time of payment to purchasers of lands of the Omaha Indians. *See* Act of August 2, 1886, 24 Stat. 214; Act of August 11, 1894, 28 Stat. 276.

In the *Act of May 15, 1888*, 25 Stat. 150, it specifically provided that the Omaha Tribe could further improve their conditions by making improvements upon their homestead by the purchase of stock, cattle, agricultural implements, and other necessary articles. Congress appropriated $70,000 from the last seven installments of $10,000 provided by the Treaty of 1854, to be paid per capita. Section 3 of the act directed the Secretary to declare forfeited all land sold in which the purchaser was in default for 60 days after passage of the act. The Secretary was directed to sell the lands at public auction after due notice to the highest bidder over and above the original appraisal. All proceeds were to go to the U.S. Treasury to be disposed of for the sole use of the Omaha Tribe. In addition, under Section 4, the Secretary was directed to set apart from the unallotted and unassigned lands of the Omaha, up to five acres for the

use and occupancy of the Woman's National Indian Association, to be used by the association for missionary and educational purposes among the Indians. The 1888 Act does not cede or relinquish the reservation nor does it compensate the Omaha Tribe a sum certain for the sold land. Instead, it speeds up treaty payments promised in the 1854 Treaty.

> *An Act to provide for the disposal of the unallotted land on the Omaha Indian Reservation, in the State of Nebraska, 37 Stat. 111, May 11, 1912*

In the early 1900s, Congress enacted legislation entitled *An Act to provide for the disposal of the unallotted land on the Omaha Indian Reservation, in the State of Nebraska*, 37 Stat. 111 (May 11, 1912). This act authorized the Secretary of the Interior to survey and appraise tracts of forty acres or its equivalent to "*sell and convey* in qualitites not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation" except for specifically reserved tracts. Sec. 1, 37 Stat. 111. It further provided the land be sold "*to the highest bidder* under such regulations as the Secretary of the Interior may prescribe, but *no part of said land shall be sold at less than the appraised value* thereof." *Id.* Section 2 included a provision preventing intoxicants into the Indian country on lands allotted, those retained or reserved, and the surplus lands sold and set aside for a townsite for a period of. 25 years. Proceeds from the sale, after paying for the expenses

related to carrying out the act and reimbursing the general trust fund of the tribe for any assessment, was to be "divided pro-rata among the children of the Omaha Tribe living on the date of the passage and approval of this Act who have not received allotments of land" under the Acts of 1882 and 1893. Sec. 3, 37 Stat. 111. The Secretary was directed to *reserve from sale* tracts for "agency and school purposes," a "tribal cemetery," the use of a "Presbyterian Church," an "old Presbyterian mission . . . in the name of the State Historical Society of Nebraska," land for "town-site purposes," Sec. 2, 37 Stat. 111.

Again, this language does not appear to meet the *Solem* test to diminish the Omaha Reservation but, instead, provides for the sale of land. Importantly, there is no legal description of the Omaha Reservation and no discussion of the railroad right of way. A search of BLM records might be useful to show whether there were maps or lists which located the unallotted lands for sale. Given the previous reading of the treaties and statutes involving the Omaha Indian Reservation, one can assume that it covered the entire reservation as created in the Treaties of 1854 and 1866. There is no statutory language providing for the absolute cession or relinquishment of land or its restoration to the public domain. Nor is there a sum certain compensation provision. The Omaha Indians were not required to vacate the land. A trust account was again created for the benefit of Omaha Indians. In addition, specific portions of land were set aside for tribal purposes.

An Act to amend the Act entitled "An Act to provide for the disposal of the unallotted land on the Omaha Indian Reservation, in the Slate of Nebraska," 43 Stat. 726, January 7, 1925

This legislation purported to amend the previous legislation from 1912. In doing so, it again authorized the Secretary of the Interior to survey and appraise tracts of forty acres or its equivalent to "*sell and convey* in qualitites not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation" except for specifically reserved tracts. *Sec.* 1, 37 Stat. 111. It again provided the land be sold "*to the highest bidder* under such regulations as the Secretary of the Interior may prescribe, but *no part of said land shall be sold at less than the appraised value* thereof." *Id.* This legislation also provided that the use of the underground mineral rights of the unallotted lands were reserved for the benefit of the children entitled to participate in said lands under the Act of May 11, 1912. *Id.* Proceeds from the sale, after paying for the expenses related to carrying out the act and reimbursing the general trust fund of the tribe for any assessment, was to be "divided pro-rata among the children of the Omaha Tribe living on May 11, 1912 who have not received allotments of land" under the Acts of 1882 and 1893. Sec. 3, 43 Stat. 726. The Secretary was again directed to reserve from sale tracts for "agency and school purposes," a "tribal cemetery," the use of a "Presbyterian Church," Sec. 2, 43 Stat. 726. In addition, it reserved land for "a

certain irrigation ditch" and a piece of land "for the special and specific use of the Omaha Tribe, to be used for fair purposes, camping grounds, race track, and other tribal needs. . . ." *Id.* Finally, the act contained a curious closing provision which provides:

> That sections 1, 3, and 4 of this Act shall not become operative so long as the need thereof exists of maintaining and agency and school for the Omaha Tribe of Indians residing on the Omaha Indian Reservation in the State of Nebraska.

Sec. 5, 43 Stat. 726.[2]

Once more, this language does not appear to explicitly diminish the Omaha Reservation as required by *Solem* but instead, provides for the sale of land. This act purported to amend the 1912 Act and contained many of the same provisions. Once again, there was no legal description of the Omaha Reservation and no discussion of the railroad right of way, leaving one to conclude that it covered the entire reservation as created in the Treaties of 1854 and 1866. A search of BLM records might be useful to show whether there were maps or lists created which located the unallotted lands for sale. There is no statutory language providing for the absolute cession

---

[2] We note for the record that the BIA's Winnebago Agency still exists and provides needed services for the Omaha Tribe. In addition, the Omaha Tribe run a school system on the Reservation for tribal members residing on the Reservation.

or relinquishment of land or its restoration to the public domain. Nor is there a sum certain compensation provision. The Omaha Indians were not required to vacate the land. A trust account was again created for the benefit of Omaha Indians in addition, specific portions of land were set aside for tribal purposes. Given the closing amendment in the 1925 Act, it appears that the additional sale of unallotted lands on the Omaha Reservation should never have occurred, given the presence of the BIA Agency and schools for Omaha Indians residing on the Reservation. This provision provides strong evidence that the reservation was expected to remain in existence and counsels against finding the reservation diminished.

In summary, under the guiding principle that diminishment "will not be lightly inferred" and Congress must clearly evince an "intent to change boundaries before diminishment will be found," it is impossible to conclude from the above-noted treaties and acts that a diminishment of the Omaha Reservation has occurred. Under the Supreme Court's test to assess congressional intent, the most probative evidence of congressional intent (the statutory language used to open the Indian lands) to diminish the Omaha Reservation is the statutory language. The conclusion that the Omaha Reservation was diminished is not supportable by a plain reading of the treaties and acts involving the Omaha Indian Reservation. Indeed, it is impossible to conclude that the Omaha Reservation, as created in 1854 and 1866, was diminished from a reading of these treaties and

acts. The Supreme Court has repeatedly stated that the act of opening a reservation alone does not diminish or terminate the Indian country status of the reservation. The treaties and statutes subsequent to 1866 do not contain explicit statements of cession, nor do they restore the land to the public domain. None of the treaties or statutes subsequent to 1865 provide for a sum certain payment to the Omaha Tribe. The Omahas were never required to vacate the land west of the railroad right of way and, in fact, were specifically guaranteed the right to take allotments on that property. Once a block of land is set aside for an Indian reservation, no matter what happens to the individual plots within the area, the entire block retains its reservation status until Congress explicitly indicated otherwise. *See Solem v. Bartlett*, 465 U.S. at 470.

ii) Right of Way Grants to the Sioux City and Nebraska Railroad Company

1880 Agreement with Sioux City and Nebraska Railroad Company, April 19, 1880

In an Article of Agreement entered into on April 19, 1880, by the Sioux City and Nebraska Railroad Company and the "Councilors, Headmen and Heads of a majority of the families of said Omaha Indians," the railroad was granted a right of way through the Omaha Reservation. The agreement appears to have been ratified or approved by the Secretary of the Interior. Upon and signing of the agreement, it was

agreed that the "railroad company shall cause to be run and surveyed a preliminary line through said Reservation." The railroad agreed to pay the Winnebago Indians the sum of "seven dollars per acre for the land so taken.". In exchange, the "United States on behalf of said Omaha Indians shall grant to said railroad company a right of way not exceeding two hundred (200) feet in width across said Reservation." The agreement referenced the Treaty of March 16, 1854 which provided "[t]hat all the necessary roads, highways and railroads which may be constructed as the country improves . . . shall have a right of way through the reservation, a just compensation being paid therefor in money." The agreement stated that this right of way through the reservation was being granted in accordance with the provisions of this treaty.

> *An Act Authorizing the Sioux City and Omaha Railway Company to construct and operate a railway through the Omaha and Winnebago Reservation in Thurston County, Nebraska, and for other purposes. 30 Stat. 912, February 28, 1899*

Congress enacted a bill on February 28, 1899, that provided:

> That the Sioux City and Omaha Railway Company, a corporation created under and by virtue of the laws of the State of Nebraska, be, and the same is hereby, authorized and invested and empowered with the right of location, constructing, owning, equipping and

> operating, using and maintaining a railway and telegraph and telephone line *through the Omaha and Winnebago Reservation* in Nebraska, beginning at a point to be selected by said railway company or near the town of Decatur, Burt County, Nebraska, and running thence in a northerly and westerly direction, over most practicable and feasible route, *through the Omaha and Winnebago Reservation*, to a point on the north line of the Omaha and Winnebago Reserve, in Thurston County. . . .

Sec. 1, 30 Stat. 912-13 (emphasis added). It further provided when any portion thereof shall cease to be used, *such portion shall revert to the Omaha and Winnebago tribes of Indians from whom the same shall have been taken*." Sec. 2, 30 Stat. 912. Minimal compensation was provided through the act. *See* Sec. 3 & Sec. 4, 30 Stat. 913.

There is voluminous case law discussing railroad rights of way and analyzing the exact property rights and interests conveyed when granting such rights of way it has been noted that pre-1871 railroad rights of way grants provided something akin to a "limited fee" interest in the right of way. *See Northern Pacific Railway v. Townsend*, 190 U.S. 267 (1903). The analysis of post-1875 railroad rights of way grants have found that such later grants conveyed a lesser interest in the rights of way more akin to an "easement." *See Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). It must also be noted that it is well settled that the Indian Nonintercourse Act provides

that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. This statute, first enacted in 1790, prohibits the sale of Indian trust land unless conveyed or approved by Congress.

In this instance, the 1854 Treaty with the Omahas noted that future rights of way would pass through the Omaha Reservation. However, it is important to point out that Congress did *not* specifically grant any rights of ways at that time. Thus, the 1854 Treaty did *not* provide for a specific conveyance of interests to the Sioux City and Nebraska Railway Company in 1854. The 1880 Agreement was an agreement between the railroad company and the Omaha Tribe, approved by the Secretary of the Interior. This agreement was approved at a point in time when railroad rights of way were conveying easement interests in the land to the railroad companies, not limited fee interests. Importantly, in 1880, Congress did *not* authorize this railroad right of way conveyance with specific legislation. Two years later, in 1882, Congress authorized the Secretary of the Interior to survey and sell the portion of the Omaha Reservation lying west of the right of way granted by the Omaha Indians to the Sioux City and Nebraska Railroad Company under the agreement of April 19, 1880. *See* Sec. 1, 22 Stat. 434. However, nothing can be read in this act as

specifically authorizing the 1880 right of way conveyance; instead, it acknowledges the right of way grant.

In 1899, Congress provided specific legislation for a right of way to be granted to the Sioux City and Omaha Railway Company for maintaining a railway and telegraph and telephone line *through the Omaha and Winnebago Reservation* in Nebraska, beginning at a point to be selected by said railway company or near the town of Decatur, Burt County, Nebraska, and running thence in a northerly and westerly direction, over the most practicable and feasible route, *through the Omaha and Winnebago Reservation*, to a point on the north line of the Omaha and Winnebago Reserve, in Thurston County. *See* Sec. 1, 30 Stat. 912-13. It further provides "when any portion thereof shall cease to be used, *such portion shall revert to the Omaha and Winnebago tribes of Indians from whom the same shall have been taken*." Sec. 2, 30 Stat. 912. Minimal compensation was provided through the act. *See* Sec. 3 & Sec. 4, 30 Stat. 913. As noted above, at this point in time, Congress was clearly conveying easement interests to railroad companies via right of way legislation.

In our opinion, in accordance with the Indian Nonintercourse Act, the Department of the Interior was unable to convey the fee title to Indian trust lands on the Omaha Indian Reservation when approving an agreement between a railroad company and a tribe; only Congress can convey the interest in trust land from an Indian tribe to another entity. The 1880 Agreement represented an agreement between

the railroad company and the Omaha Tribe, approved by the Secretary of the Interior. It clearly stated that it was a right of way, not a conveyance of fee land. Without a specific Congressional act, the granting of a simple right of way cannot convey title to Indian land. Importantly, this agreement was approved in 1880, not 1854, at a point in time when railroad rights of way were conveying easement interests in the land to the railroad companies, not fee interests.

Congress can acknowledge that a future act will occur on a particular Indian reservation. However, all actions occurring at a later date without federal legislation do not carry the same weight as actions authorized with specific legislation. Congress did not authorize a railroad right of way to the Sioux City and Nebraska Railroad Company in 1854. In 1880, Congress did not authorize this railroad right of way conveyance with specific legislation. Two years later, in 1882, Congress authorized the Secretary of the interior to survey and sell the portion of the Omaha Reservation, recognizing that this land was west of the right of way granted by the Omaha Indians to the Sioux City and Nebraska Railroad Company under the agreement of April 19, 1880. However, nothing can be read in this act as specifically authorizing the right of way conveyance; instead, it acknowledges the right of way grant. In 1899, Congress provided specific legislation for a right of way to be granted to the Sioux City and Nebraska Railroad Company for maintaining a railway and telegraph and telephone, line through the Omaha and Winnebago Reservation

in Nebraska. Therefore, in this particular scenario, Congress did not grant the Sioux City and Omaha Railway Company a right of way over the Omaha Reservation until 1899. This was long after Congress granted more than an easement to the railroad companies. Thus, in our opinion, the Sioux City and Nebraska Railroad Company was granted a railroad right of way, not fee title, through the Omaha Reservation.

It is also our opinion that the reverter language contained in the 1899 Act cannot be interpreted any differently than to conclude that when a portion of the railroad right of way ceased to be used, it would revert back to the Omaha and Winnebago Tribes. A plain reading of the statute supports this conclusion. Congress would not have clearly stated this reversion if it had not intended the result in addition, under the canons of construction related to Indian issues, any uncertain expressions are resolved in favor of the Indians. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

While statutory analysis is the most important prong of the *Solem* test on diminishment, it is likely that a court would look to the second and third prongs in this particular instance. Therefore, this memorandum will attempt to analyze these two additional prongs as well.

B) Part 2 – Legislative History & Surrounding Circumstances

If the treaty and statutory language are found to be ambiguous, the Supreme Court has stated that it will look to the tenor of legislative reports to Congress that passed the statute and the manner in which the negotiations were carried out for evidence of the understanding of an intent to diminish the reservation. *See* Cohen Handbook of Federal Indian Law 3.04[3] (2005 Newton ed.). The surrounding circumstances of the acts are relevant to determine evidence of intent and the "contemporaneous understanding" of acts' purpose and effect. For example, even though there was no specific statutory language to show a surrender of tribal interest in unalloted lands in *Rosebud Sioux Tribe v. Kneip*, the surrounding circumstances led the Court to conclude that Congress intended to diminish the reservation. However, in *Solem v. Bartlett*, the Court concluded that because there was no "substantial and compelling evidence of a congressional intention to diminish," Congress simply intended to open the reservation to non-Indian settlement and not to diminish the boundaries.

Among other things, courts will look at when the action was taken; prior history and attempts to negotiate cession of land; jurisdictional treatment subsequent to the legislative action; whether the agreement was fully explained to tribal members; and whether there was written consent from a majority of the tribe. When the legislative history and circumstances surrounding acts "unequivocally reveal a

widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," then the court will conclude diminishment. *Solem* 465 U.S. at 471.

In this instance, we have been able to gather minimal legislative history and documentation showing the surrounding circumstances of the acts noted above. This memorandum will summarize what is currently available to us in the administrative record.

First, this office has been provided with the congressional record from the House of Representatives and Senate focusing on the immediate days surrounding passage of the Act of 1882. In the U.S. Senate, Sen. Saunders, from Nebraska, noted:

> The bill authorizes the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha Reservation. This land has no settlers upon it, us we are able to show from the papers and from the agent himself, and is yielding nothing to the Indians, nothing to the Government, and nothing to the country. It happens to be one of those few cases where *I believe everybody is satisfied to have a bill of this kind passed.* The Indians want it passed so as to put the money derived from the sale on interest. The white people are there ready to buy the land and put it in cultivation. The Indian Department is satisfied that it is best for the Indians and for the country to have the land sold.

1882 Cong. Rec. 3027 (April 19, 1882). Sen. Saunders went on to note that "[t]he *Indians are nor proposing to leave that part of the country and settle elsewhere. They have plenty of land left, and propose to remain there.*" *Id.* Sen. Ingalls, from Kansas, stated:

> It will be observed that this bill practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers. It also enables Indians who may desire to possess their lands in severalty to acquire a qualified private title. The lands that they occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts so that the interest and control and jurisdiction of the United States is absolutely relinquished.

Id. at 3028. Sen. Allison voiced concern that there, was no provision in the bill to permit the Omaha tribal members to take allotments on the western portion of the reservation. *Id.* at 3029. Sen. Dawes responded that any of the Omaha Indians could "go on any part of all the present reservation, and is entitled to a patent or what is equivalent to a patent." *Id.* Sen. Allison then, stated that a provision should be inserted excepting the rights of the Indians to the 50,000 acres. *Id.* Sen. Dawes noted that "it was thought wise to provide that if any Indian had located there he should be taken care of and not thrown out. A letter was read into the record from the Interior Department which noted that "there are no Indians living on the western portion of the Omaha

reservation; that no land has been allotted to any of them so far as I can ascertain; and furthermore that there are no improvements, such as houses, fencing . . . upon the 50,000 acres of land. *Id.* However, later in the debate, Sen. Ingalls noted, when talking about taxation "[t]ake the case of this bill, *where the land is confessedly land in an Indian reservation, and is to be sold to whites or Indians*; does the Senator hold that the government has the right to sell a portion of that land to a white man and put that condition in the patent that it shall not be taxed for twenty five years?" *Id.* at 3030. Sen. Saunders further remarked,

> But this land is not occupied by the Indians. It is occupied by nobody. It is vacant land, so far as anything in the way of improvements is concerned, and they are proposing to sell it, and sell it for their own benefit. The money goes into their own pockets or into the Treasury of the United States for their benefit. . . . This, as I say, is done for their benefit, and every dollar of the proceeds goes into their own fund.

Id. at 3031. In discussing the Treaty of 1866, Sen. Dawes made mention to the possibility that Omaha tribal members had already settled on the land being contemplated for sale. *Id.* However, Sen. Saunders asserted that he was mistaken. Sen. Conger noted that the land being sold was the "cream of all that reservation" and lamented the "continual attempt by legislation not only to take away the fairest and richest portions of the Indian reservations." *Id.* at 3032. Finally, Sen. Dawes recognized that representatives

of the Tribe as stated "while they were unwilling to take upon their ground any other Indians, *they were very anxious to sell a portion of their real estate and obtain the money, so that the interest of that money they could use for the improvement of the residue of their property*. They had more land than they could occupy." *Id.* Further, he noted:

> When this bill came in *I was troubled lest the sale of 50,000 acres would leave the reservation too small.* I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs *I was assured that it would leave an ample reservation, as much as, if all the Indians should take in severalty*, would give each one a farm and have some left for such increase of numbers as might probably be expected in the next twenty-five years; that there was no apprehension on the part of the Department; they were satisfied. He said that it would be for the interest of these Indians to have a portion of their lands converted into money the use of which they could have.

Id. (emphasis added). The Senate continued its consideration of the bill until the following day.

On April 20, 1882, the Senate reconvened to discuss the Omaha Indian Reservation. At that time, they noted an amendment that had been added the day before which stated, "any right in severalty acquired by any Indian under existing treaties shall not be affected by this act." 1882 Cong. Rec. 3077 (April 20, 1882), Sen. Dawes explained,

> The adoption of this amendment does not affect the merits of the whole bill. The whole bill rests upon a recommendation of the committee that it is proper to sell off from this reservation of about one hundred and fifty thousand acres 50,000 acres in a block on the western side of it. That is one question. *But the Omaha Indians have the whole reservation and occupy it under an existing treaty in which it is stipulated that any Indian may go upon any part of the whole reservation and occupy one hundred and sixty acres for the head of a family, and eighty acres for a single individual*, and shall be entitled under the treaty to an instrument in writing from the United States which is equivalent to a qualified patent. It is said by the Senator from Nebraska that no one of the Indians has so gone upon the 50,000 acres which it is proposed to sell. *There are, however, quite a number of them who have gone onto some part of the reservation and made such locations, and who are entitled under existing treaties to the qualified patent they have come to Congress praying that Congress will give them the patent. To make it perfectly safe and preserve the rights of any Indian who may have located upon this land is the design of my amendment. I do not know that it will apply to any Indian, though I am not quite certain but what if will.*

Id. at 3077-78 (emphasis added). Sen. Beck acknowledged that the Indians "*have a right to go upon any part*" *of the reservation. Id.* Sen. Jones further noted

"[i]f I understand the bill, it proposed to authorize the sale of an Indian reservation located in the body of a State. The Indians desire to sell the lands, and it is not denied that the lands may be purchased by white people as well as by Indians; they are to be put up to the highest bidder and sold for the benefit of the tribe. It is understood that an Indian has the right of purchase the same as a white man with respect to the land." *Id.* Sen. Beck attempted to explain by stating "this reservation and all Indian reservations may be divided up into a hundred lesser reservations, and if there are forty-nine thousand acres of this fifty thousand acres sold to white men, and the remaining one thousand acres held by Indians and alloted to them in severalty, we have a right to regard that one thousand acres of the fifty thousand acres as still remaining part of the Indian reservation and we can protect them against taxation and against sales as we could if the original reservation had never been broken up." *Id.* Sen. Dawes stated:

> if we are under treaty stipulations with Indians whom we have put upon a reservation that we will guarantee them the land upon which there is a tribe whenever they choose to take it in severalty, quoad hoc each individual Indian occupies to that extent the reservation, with all the treaty stipulations around him to protect and guard him; but if an Indian buys like a white man any portion of this 50,000 acres, to come back to this bill, no one supposes that he ought to be upon any other ground than a white man

> who purchases a part of it. But the reason for this discussion and the purpose of the original phraseology in the bill was to reach another class of Indians, a class of Indians who had gone under treaty stipulation in severalty upon certain portions of the one hundred and fifty thousand acres, and claim under the treaty a right in severalty to that land under treaty stipulations which protect the whole tribe when they occupy it in common from taxation and from judgments; and it has always been supposed that we had authority under such circumstances to protect the Indian who took his title not by purchase as a white man does, but under treaty stipulations from taxation.

Id. The bill discussed in this congressional record ultimately passed the Senate. *Id.* at 309.

Several months later, the sale of Land from the Omaha Indian Reservation was raised in the House of Representatives. *See* House Report, 47th Cong, 1st Sess., Rpt. No. 1530 (July 1, 1882); 1882 Cong. Rec. 6537 (July 26, 1882). In the House Report, it was noted that the bill that "with the consent of the Omaha tribe of Indians, all that part of the Omaha Indian Reservation in the State of Nebraska, lying west of the line of the Sioux City and Nebraska Railway, may be surveyed, appraised, and sold to actual bona fide settlers, who may hereafter, under the provisions of this bill, settle upon said lands, the proceeds of such sale being for the use and benefit of said Omaha tribe of Indians leaving for the use and

occupancy of the Omaha Indians about 140,000 acres of land." House Report, pg. 1. The House Report contained a Memorial of the members of the Omaha Tribe of Indians, in which numerous tribal members stated that they had take allotments of land or entered claims within the limits of the Omaha reservation and were seeking "full tide to the land." *Id.* at pg. 2. Over 50 Omaha tribal members included statements why they wanted full title to their land; not a single tribal member mentions giving up a portion of the reservation in order to make this happen. *Id.* at pgs. 2-12.

On the House floor, Congressman Haskell noted that "[b]efore any land is sold [the Indians] are at liberty to make their individual selections of one hundred and sixty acres . . . All the lands not allotted are to be patented under the broad seal of the United States to the tribe in common, so as to give them an absolute, indefeasible title to about 100,000 acres." 1882 Cong. Rec. 6538. Congressman Haskell further noted "*[t]he total reservation is about 150,000 acres. It will leave some 100,000 acres to these Indians.*" *Id.* When asked for clarification, Congressman Haskell was asked if severalty selections could be made anywhere in the reservation to which he answered "[y]es sir; any where within the reservation." *Id.* Asking if this would take place before the sale, Congressman Haskell responded that the "the treaty stipulation in reference to severalty is not to be affected by this." *Id.* He later stated "[a]ny Indian, however, who wishes to

take his piece of land to the west of the railroad can do so." *Id.* at 6539.

The House reconvened their deliberation the next day. *See* 1882 Cong. Rec. 6571 (July 27, 1882). During this time, they focused on an amendment that would provide

> That no part of said land shall be sold until the allotment shall have been made to the said Indians under the fifth section of this act. And said Indians, or any part of them, may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation, either east or west of said right of way mentioned in the first section of this act.

Id. Congressman Holman suggested that the word "all" be added to read "until all the allotments shall have been made." *Id.* Congressman Valentine asked that the first sentence be removed and have the amendment include the latter language. *Id.* Congressman Haskell asked "[w]hy not modify the amendment so that no sales shall be made until the Indians now of proper age shall have made selections." *Id.* Congressman Valentine responded "[t]hey do not care about making selections over on that side of the road at all." *Id.* With the modification, the amendment was agreed to and the House voted to pass the bill. *Id.* at 6572-73.

On February 10, 1888, the Secretary of the Interior sent a letter in response to a Senate resolution of

January 31, 1888, for information, regarding the sale of lands "in the Omaha Reservation." Senate Ex. Doc. No. 77, 50th Cong., 1st Sess., pg. 1. In this letter, the Secretary noted that in the call for "information as to what amounts to lands upon the Omaha Reservation (in Nebraska) have been sold pursuant to a statute approved August 17, 1882." *Id.* First, he stated that the "[a]mount of lands sold up to and including December 31, 1887, 49,630.59 acres." *Id.* Second, the "[a]mount of money paid into the Treasury on account of such sales from the date of first payment to December 31, 1887, $154,654.62" with "$4,108.06 interest due and unpair up to December 31, 1887." *Id.* at pg. 2. It was noted that Congress had granted an extension for the time of payment to purchasers, recognizing that no steps had been taken to enforcement payments due, or to recover for the session of lands sold. *Id.*

From this information, we can glean that in 1882, some members of Congress thought the western area would no longer be part of the Omaha Indian Reservation. However, other comments lead to the conclusion that the land would remain part of the reservation. But, most important, this documentation evidences very little about what the Omaha Indians were thinking at this time, except that they were requesting the title to their individual property. Many different statements alleged that everyone, including the Omahas, were happy with the legislation. However, it is doubtful that the Omaha Indians would have been satisfied with a diminishment of their

reservation. In summary, the evidence provided in these documents is not compelling enough to show diminishment. Nor does this information reveal a contemporaneous understanding that the 1882 Act modified the reservation. We are guided by the overarching principle that ambiguities must be resolved in favor of the Indians.

It should also be noted that the above-referenced documentation centers around the 1882 Act. Without a more complete, legislative history and summary of surrounding circumstances, it is impossible to unequivocally prove the contemporaneous understanding of the Omaha Indians or Congress of true meaning of the treaties and legislation ranging from 1854 through 1882. In order to obtain a complete picture of what was happening during the enactment or the treaties and statutes, additional research should be conducted to provide information regarding prior history and previous attempts to negotiate the treaties and statutes, jurisdictional history, whether the agreements were fully explained to Omaha tribal members, and whether there was written consent and understanding from a majority of the tribe regarding the ultimate results of all of the congressional actions such as the land sales records. A search of BLM records could show whether there are maps or lists which locate the unallotted lands for sale and would be indicative of a contemporaneous understanding of the location of the boundaries. There is little to no correspondence from the individual tribal members, BIA, Indian agents, the State of Nebraska and local

governmental officials regarding the negotiations, reasons for, and results of the legislation. Without a complete legislative history and details involving actions occurring during and immediately after the enactment of the above-cited treaties and statutes, it is impossible to make any conclusions regarding the contemporaneous understanding of their real purpose and effect.

Ordinarily, this type of evidence is provided by expert historical research. We recommend that the Omaha Tribe immediately hire a credible expert Witness to fully research the history of the Omaha Indian Reservation. The BIA ordinarily assists tribes with this effort by providing litigation support funding to the extent that such funding is available. Based on our preliminary review, we believe the Tribe may have a colorable legal argument and encourage the BIA to favorably consider a tribal request for litigation support funding. If possible, a stay of the pending litigation should be immediately sought as this research is conducted.

C) Part 3 – Subsequent Actions and Pattern of Settlement

Finally, the Supreme Court has approved review of post-enactment history, noting that actions by Congress, the BIA, and local authorities with regard to the unallotted open lands, "particularly in the years immediately following the opening, have some evidentiary value." In examining this history, the

Court has also explicitly focused on demographics, noting that a reading of its previous cases reveals that "[w]here non-Indian settlers flooded, into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."

In some cases, a Supreme Court has stated it may look to events occurring after passage of the act to decipher Congressional intent. *See Solem*, 465 U.S. at 471. This might include subsequent treatment of the area and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S. at 344. However, because "subsequent demographic history is . . . an unorthodox and potentially unreliable method of statutory interpretation," *Solem*, at 472 n.13, courts will resort to it only if the text of the act or its legislative history offers clear support for a finding of diminishment. As the *Solem* Court noted:

> there are, of course, limits to how far we will go to decipher Congress's intention in any particular surplus land act. When both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

Id. at 472 (citing *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Seymour v. Superintendent of Washington State*

Penitentiary, 368 U.S. 351 (1962). These subsequent events are considered to be of secondary importance and the least persuasive prong of the *Solem* test.

As detailed above, Congress enacted several pieces of legislation after 1882 regarding the Omaha Reservation. In analyzing this legislation as a subsequent event since it was enacted after the 1882 legislation, the most informative to our inquiry was when Congress passed *An Act Authorizing the Sioux City and Omaha Railway Company to construct and operate a railway through the Omaha and Winnebago Reservation in Thurston County, Nebraska, and for other purposes*, 30 Stat. 912, February 28, 1899, 17 years after passing the legislation allowing the sale of the western portion of the reservation. Almost two decades later, Congress provided for the authorization of the "right of location, constructing, owning, equipping and operating, using and maintaining a railway and telegraph and telephone line *through the Omaha and Winnebago Reservation* . . . over the most practicable and feasible route, *through the Omaha and Winnebago Reservation*, to a point on the north line of the Omaha and Winnebago Reserve, in Thurston County. . . ." Sec. 1, 30 Stat. 912-13 (emphasis added). Congress further provided "when any portion thereof shall cease to be used, *such portion shall revert to the Omaha and Winnebago tribes of Indians from whom the same shall have been taken.*" Sec. 2, 30 Stat. 912. Importantly, the 1899 Act specifically recognized the continued existence of the *eastern and western portions* of the Omaha Indian Reservation by specifically

noting the grant of the right of way running "*through* the Omaha and Winnebago Reservation." If the western portion of the Omaha Reservation had been diminished, Congress could have noted the right of way running to the "side of the Omaha Reservation" or over the "former Omaha Reservation." In addition, the legislation specifically provided that the right of way would revert back to the Omaha and Winnebago Tribes when it ceased to be used. Arguably, there would be no reason to revert the land back to the Omaha and Winnebago Tribes if it was contemplated that they would no longer have any interest in the land. The 1899 Act provides substantial evidence that Congress did not diminish the Omaha Reservation.

On February 10, 1888, the Secretary of the Interior sent a letter in response to a Senate resolution of January 31, 1888, for information regarding the sale of lands "in the Omaha Reservation." Senate Ex. Doc, No. 77, 50th Cong., 1st Sess., pg. 1. In this letter, the Secretary noted that in the call for "information as to what amounts to lands upon the Omaha Reservation (in Nebraska) have been sold pursuant to a statute approved August 17, 1882." *Id.* First, he stated that the "[a]mount of lands sold up to and including December 31, 1887, 49,630.59 acres." *Id.* Second, the "[a]mount of money paid into the Treasury on account of such sales from the date of first payment to December 31, 1887, $154,654.62" with "$4,108.06 interest due and unpair up to December 31, 1887." *Id.* at pg. 2. It was noted that Congress had granted an extension for the time of payment to

purchasers, recognizing that no steps had been taken to enforcement payments due, or to recover for the session of lands sold. *Id.*

In 1989, this office issued an opinion which found that based on statutory "language alone diminishment was not the intent of Congress." However, the opinion went on to find a *de facto* diminishment. This opinion was based on a less developed administrative file than before us today and predates the Supreme Court's decision in *Yankton*. In addition, it is worth noting that the Supreme Court has warned that one should avoid issuing conclusions of diminishment relying solely on demographics. In *Yankton*, the Court stated that reliance on demographics "should probably not be viewed as sufficient by itself to diminish" and should only be looked at as an "additional clue." *Yankton*, 522 U.S. at 356. "Every surplus land act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Id.* The U.S. Court of Appeals for the Eighth Circuit has noted one should look first and foremost at the statutory language for Congressional intent to diminish the boundaries of a reservation and notes that when such language "exclusive reliance on the third *Solem* factor [i.e. the population that settled the land] to created a quasi diminishment [is] totally inappropriate." *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1298 (8th Cir. 1994). As noted above, the treaties and acts involving the Omaha

Indian Reservation and the legislative history in our possession fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands. At this time, without a well-developed record, the additional clues of demographics should not be exclusively relied on to make any conclusions regarding the reservation boundary. For these reasons, we believe it is appropriate to review our earlier opinion.

On February 15, 2007, the Nebraska Attorney General issued an advisory opinion that concluded that the western portion of the Omaha Indian Reservation has been diminished. This opinion relies heavily on the reasoning in the 1989 opinion from this office. The opinion also relies on the 1912 Act involving the Omaha Indian Reservation, however, the opinion fails to recognize that the 1912 Act was amended by striking out all of the clauses from 1912 and replacing them with the language found in the 1925 Act, 43 Stat. 726. The language in the 1925 fails to include the provision involving the prohibition of liquor relied upon by the Attorney General to find diminishment.

Finally, the Attorney General relies on the ruling of the District Court of Thurston County in *State v. Picotte*, Case No. FE99-23, County Court of Thurston County, Nebraska, Nebraska (2000) in which the court failed to properly read and analyze the facts before it. In *State v. Picotte*, the Court relied on the Act of May 15, 1888, 25 Stat. 150 to infer congressional intent to diminish the reservation because the

Act provided that any land allotted to settlers that was now in default "west of the right-of-way, would not revert to the Omaha Tribe but would be sold at public auction." The Court incorrectly interpreted the statute, however. The 1888 Act does not mention the right-of-way, but instead authorized the Secretary to sell at public auction "all lands sold under [the 1882 Act] upon which the purchaser shall be in default" and "all tracts of land embraced by the [the 1882 Act] not heretofore sold . . . the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians." Therefore, this Act simply changed the way the Omaha reservation land was sold; instead of being sold as allotments for no less than $2.50 per acre, all the land not sold as allotments under the 1882 Act, including the land in default, was sold at public auction, the proceeds of which were placed into a trust account for the Omaha Tribe.

We further note that the precedential effects of a county court deciding a criminal matter are not persuasive in a reservation diminishment analysis. In addition, the Attorney General appears to have been working from the same inadequate record in existence at this time. For these reasons, the conclusions in the Nebraska Attorney General's opinion provide no credible value to the diminishment analysis.

Over the years, the BIA has described the Omaha Indian Reservation in contradictory terms and treated the region in an inconsistent manner. For example, in 1991, the BIA Aberdeen Area Director requested

this office for an opinion that the official boundary of the Omaha Indian Reservation was the west line of the abandoned railroad right of way. *See* Letter from Area Director, Aberdeen Area Office to Field Solicitor, Twin Cities, MN, August 2, 1991. In addition, a BIA map specifically notes that Congress diminished the borders of the Omaha Indian Reservation when it granted the railroad right of way. *See* Map of the Omaha Indian Reservation created by the BIA Aberdeen Area, October. 8, 1994. However, in 1999, the BIA Aberdeen Area Director opined that the Omaha Indian Reservation boundaries "have not been changed or altered since its establishment by the survey of 1855" except for the creation of the Winnebago Indian Reservation, referred to support in a map titled Omaha Reservation of August 8, 1996, issued by USDA-BIA Aberdeen Area GIS, of march 28, 1999. *See* Memorandum from Area Director, Aberdeen Area to Superintendent, Winnebago Agency, August 13, 1999. The mixed record reveals no dominant approach, and it carries little force. Given the lack of an adequate record on this subject, this evidence is probably not credible to discern any sort of reliable conclusion of the BIA.

Clearly, there is a sparse and lacking record to evidence subsequent treatment of the land in question. The 1899 Act provides strong evidence that the western portion of the Omaha Reservation survived the selling of surplus lands. However, additional research must be conducted. In particular, research should be commissioned to locate discussions about

the Omaha Indian Reservation in Congress after 1882, particularly focusing on the periods of time around when the Acts of 1886, 1888, 1894, 1899, 1912, and 1925 were enacted. A thorough search should be conducted for correspondence, land records, and maps from the Department of the Interior, the Omaha Tribe and individual tribal members, the State of Nebraska, and local governmental official referencing the Omaha Indian Reservation from 1882 to present day.

The administrative record does not include any information regarding the pattern of settlement of the Omaha Indians. An expert should be retained to discern the approximate number of tribal members, how many tribal members are residing within the Omaha Reservation as established in 1854 and 1865, and the total population (Indian and non-Indian) within the Omaha Reservation. Such a report should also delineate the approximate number of acres of land within the Omaha Reservation, the exact amount of tribal trust and fee land, and the exact amount of county, local government, and private land. It should detail the demographics of all the populated areas as well as describe the undeveloped land. Special analysis should be conducted to discern the "Indian character" of the area in addition, a detailed analysis should be obtained regarding the assumption of jurisdiction over the area in question.

e) Statutory Interpretation/Canons of Construction

The above-mentioned treaties and acts were negotiated in a language foreign to the Omaha Tribe. The Supreme Court has often held that "treaties with the Indians must be interpreted as they would have understood them" with any uncertain expressions resolved in favor of the Indians. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Therefore, it is particularly important to attempt to discern how the Omaha tribal members interpreted the treaties and acts noted above. In particular, an expert should be retained to determine how the Omaha Indians interpreted the 1854 Treaty with regard to the reservation and rights of way running through their reservation; the 1865 Treaty, the 1872 Act, the 1880 Articles of Agreement with the railroad; the 1882 act that allotted land throughout the entire reservation and sold the remaining land on the western portion of the reservation; and all subsequent acts involving the reservation. This should include reports of the Department of the Interior, both internally and to Congress. Negotiations with the Tribe are of utmost importance: For example, did the Omahas believe that the land would remain in their ownership after the rights of way were granted; did they believe the western portion would remain part of their reservation after the unallotted portion was sold to non-Indians?

Conclusion and Recommendation

Based upon the record before us, since diminishment is not to be lightly inferred and a reservation retains it status no matter what happens to the title of individuals plots of land within the area until Congress explicitly indicates otherwise, a plain reading of the treaties and statutory language involving the Omaha Indian Reservation does not evidence a diminishment of the reservation boundaries. Our review of the documentation of legislative history and surrounding circumstances which is available in the record does not show a contemporaneous understanding that the reservation would be diminished and in accordance with *Yankton*, leads us to conclude that our 1989 opinion should be revisited. However, as acknowledged above, the record is inadequate to make any broader conclusions at this time.

The Omaha Tribe should immediately seek expert support to amass a thorough and complete record of the actions surrounding the treaties and statutes creating and involving the Omaha Indian Reservation and all subsequent actions and correspondence involving the reservation. Since the Omaha Tribal Resolution specifically mentions a request for litigation support funds, we strongly encourage the BIA to immediately seek these support funds on behalf of the Omaha Tribe. A diminishment case cannot be accurately reviewed and analyzed by a court without the types of thorough and well-researched documentation, including expert reports, which we described in this letter.

At this time, because we believe the administrative file lacks important and relevant information, the United States is unable to determine if it can provide legal services to the Omaha Tribe on this matter. Once historical research has been conducted and additional documentation is located, this office will immediately review our prior opinion on the matter and reassess whether the facts warrant the United States intervening or appearing *amicus curiae* in this matter.

Please contact Libby Washburn at 617.864.3580 if you have any questions about this letter.

Sincerely,

/s/ Priscilla Wilfahrt
Priscilla Wilfahrt
Field Solicitor

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

United States Department of the Interior

[SEAL] OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

Memorandum

From: Patrice H. Kunesh, Deputy Solicitor – Indian Affairs

To: Priscilla Wilfahrt, Twin Cities – Field Solicitor

Subject: Withdrawal of letter regarding Omaha Indian Reservation Boundary

I have reviewed your letter of April 24, 2008, to the Great Plains Regional Director of the Bureau of Indian Affairs, which concludes that the boundaries of the Omaha Indian Reservation have not been diminished. The April 24, 2008 letter supersedes your Office's letter of June 27, 1989, to the Great Plains Regional Director regarding "Survey of Western Boundary of Omaha Reservation."

The June 27, 1989 letter is hereby withdrawn and is not to be relied upon or used by your office.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 12, 2013)

EXHIBIT 060

REBUTTAL OF

"THE WESTERN BOUNDARY OF THE OMAHA INDIAN RESERVATION" WRITTEN BY EMILY GREENWALD

A Rebuttal Document

Submitted by

R. David Edmunds, Ph. D.

Richardson, Texas

May 31, 2012

TABLE OF CONTENTS:

Historical Patterns ..... **p. 3**

The Failed Act of 1872 ..... **p. 8**

Comparison of the Language in the Winnebago Treaties and the 1882 Land Act ..... **p. 11**

Description of Reservation Lands Included in the 1882 Land Act ..... **p. 13**

Allotment ..... **p. 16**

Hiram Price, Alice Fletcher and Allotment Policies ..... **p. 17**

Omaha Participation in the Early History of Pender and Thurston County ..... **p. 18**

Statistics ..... **p. 20**

Demographic History ..... **p. 23**

"Current Treatment" of Reservation Lands West of the Railroad ..... **p. 24**

Endnotes ..... **p. 26**

REBUTTAL OF "THE WESTERN BOUNDARY OF THE OMAHA INDIAN RESERVATION," WRITTEN BY EMILY GREENWALD

By R. David Edmunds

I have read the report entitled "The Western Boundary of the Omaha Indian Reservation, written by Emily Greenwald, and I believe that the report contains significant omissions of factual information relating to this subject, and significant errors of interpretation. I will discuss these omissions and errors in the rebuttal document that follows.

1. Greenwald fails to mention an obvious, ongoing historical pattern in which non-Indians have ignored both federal treaty obligations and Omaha tribal sovereignty, and have continually attempted to acquire the Omaha homeland. In treaties signed in 1815 (Portage de Sioux), 1825 (Fort Atkinson), and 1854 (Washington), the federal government specifically promised to protect the Omahas and their property from American citizens or "the Sioux and all other hostile Indians."[1] These promises were not honored. Despite assurances to the contrary, throughout the first two thirds of the nineteenth century the Omahas suffered continual

raids by the Sioux and other enemies and the federal government did little to stop the carnage.[2]

Meanwhile federal officials worked diligently to acquire the Omaha homeland. Several of the treaties through which the Omahas ceded portions of their territory were conducted amidst fraud and chicanery and illustrate the federal government's callous disregard for Omaha interests. In 1830, at a treaty signed at Prairie du Chien Wisconsin, the Omahas ceded their claim to lands in western Iowa to the United States, but retained the right to hunt across this territory. Yet Indian Agent James Dougherty charged that federal officials in Washington re-wrote sections of the treaty before sending it on to the Senate for ratification. Before the agreement was ratified, it was changed to exclude the Omahas from hunting on lands east of the Missouri River.[3] Commissioner of Indian Affairs Carey H. Harris agreed that the final wording of the treaty had been altered and sent the Omahas a new treaty offering them an additional $15,000 to relinquish their right to hunt in Iowa. The Omahas signed the document, but the U. S. Senate refused to ratify it. Because of this alteration, the Omahas lost their hunting lands in Iowa and were never compensated for such loss.[4]

The 1854 treaty through which the Omahas ceded much of their land in eastern Nebraska was also fraught with chicanery. In January 1854, Indian Agent Thomas Gatewood negotiated a treaty with the Omaha tribal council at Council Bluffs, Iowa in which the tribe agreed to cede most of their remaining lands

in Nebraska in exchange for a reservation, an annuity of $40,000 per year for thirty years, and payments to certain traders to whom the Omahas were indebted. The treaty was signed by fifty-nine leading chiefs and headmen of the tribe. The treaty was sent to Washington accompanied by a delegation of six Omaha leaders who were authorized to "slightly modify" the treaty if needed prior to its acceptance by the federal government.[5] But when the delegation reached Washington, Commissioner of Indian Affairs George Manypenny rejected the "Gatewood Treaty" which had been negotiated at Council Bluffs and forced the delegation to negotiate a new treaty, which paid the Omahas over $400,000 less for their lands and also provided for the future allotment of their new reservation. Moreover, the Gatewood Treaty, the treaty negotiated by the tribal council in Council Bluffs, had not even mentioned allotment. Since the delegation had been authorized to only "slightly modify" the Gatewood Treaty, if necessary, this new agreement clearly was clearly illegal. Yet it was ratified by the U.S. Senate.[6]

The allotment process and the transfer of Omaha allotments to non-Indians also have been fraught with dishonesty. In 1865 federal officials arbitrarily substituted a new allotment schedule into a treaty through which the Omahas sold a tract of reservation land to the government to be used as part of the Winnebago reservation. This change, which reduced the size of Omaha allotments, was not mentioned to nine of the ten Omaha delegates who negotiated and signed the 1865 treaty while they were in Washington.

The lone exception was Joseph La Flesche (the only literate delegate), who privately questioned the change, but was bribed by Indian Agent Robert Furnas not to inform the other delegates of the reduced acreages in the allotments. Furnas then banned La Flesche from the Omaha Reservation.[7]

Greenwald also completely ignores the widespread pattern of deception, illegality, and fraud associated with the loss of Omaha lands after the reservation was allotted. Although the 1882 Land Act originally discouraged Omahas from leasing their lands, non-Indian businessmen from Pender, Homer, and nearby communities were eager to gain access to Omaha grazing lands and illegally leased Omaha allotments for a pittance, then re-leased these lands to non-Indian farmers at a handsome profit, sometimes even refusing to reimburse the original Omaha allottees for the initial lease payment.[8] These practices and the illegal grazing of cattle owned by non-Indians on Omaha allotment lands led to armed encounters, legal actions, and a questionable Congressional investigation of the notorious "Pender Ring" led by William Peebles, a Pender businessman.[9] In 1903, Omaha Indian Agent Charles Mathewson was forced to resign when a federal investigation indicated that he had cooperated in the illegal sale of reservation lands to local white land speculators[10]

Greenwald also fails to discuss the unscrupulous methods used by federal agents in collusion with local land speculators to gain access to Omaha lands under the auspices of the Burke Act. Passed in 1906, the

Burke Act allowed the President or the Secretary of the Interior, upon the recommendation of a local Indian Agent or other appointed federal agents, to declare that allottees holding lands under trust from the federal government could be deemed "competent" before their twenty-five year trust period had expired. "Competent" Omahas (or other Indians) would then be given their allotted lands in fee simple and such lands could be sold, or be subject to local taxation.[11] By 1908, local officials initially declared that one hundred twenty-three Omahas were competent to receive their allotments in fee simple, but the Omahas themselves petitioned the federal government in protest, arguing that many of these tribespeople who had been declared competent lacked the acumen or education to manage their own allotments.[12] THE PENDER TIMES gloated that "all the desirable farm land, as good as the best in northeastern Nebraska, will fall into the hands of whites who have awaited the move," but Indian agents warned that many of these "competent" Omahas would soon fall victim to "grafters and land grabbers."[13]

The trust period on all remaining Omaha allotments assigned under the 1882 Land Act was due to expire in June, 1809, but one week prior to their expiration, President William Howard Taft, who was concerned about the corruption, intervened and extended the trust period for another ten years. Land speculators, Thurston County officials, and politicians from Nebraska were incensed and complained to the Bureau of Indians Affairs since they believed their

plans to gain access to Omaha land, or to tax the allotments had been postponed by ten years. In response, federal officials capitulated to the pressure and established a "competency commission" which supposedly examined all Omahas who still held allotments under trust.[14]

If the commission declared the tribesperson "competent," the Omaha was given his/her allotment in fee simple. Almost every scholar who has examined these proceedings has been dismayed by this process which historian Judith Boughter has described as "arbitrary and unfair." The commissioners ruled some Omahas "competent" who could not read, write, nor understand English, and even included others as "competent" whom they had failed to interview. By March, 1910 the commission had declared two hundred ninety four Omahas "competent."[15]

Lists of these "competent" Omahas were printed in THE PENDER TIMES and THE WINNEBAGO CHIEFTAIN and the great land rush was on. Many of these Omahas, illiterate and uninformed, were tricked into signing away their lands for a pittance, and by 1912 over ninety percent of the Omahas who had been designated as "competent" by the commission had lost their lands; eight percent had mortgaged their acreages; and only two percent retained their land free from any encumbrance. Although federal officials admitted that the 1910 competency commission "was not a success," and Omaha Indian agents recommended that it be abolished, bureaucrats in Washington continued the program. By 1916,

nearly ninety percent of all Omaha allottees holding fee patents had either sold their lands or mortgaged them so heavily that they had little chance of ever reclaiming them.[16]

Not satisfied with the acquisition of Omaha lands, politicians from Nebraska also mounted an assault on Omaha bank accounts. In 1893 George Meikeljohn, a Congressman from Nebraska, introduced a bill into Congress that would have allowed taxes on Omaha lands to be deducted from tribal trust funds. The bill failed, but in 1905 Thurston County officials tried to tax funds from the sale of heirship lands received by individual Omahas and then deposited in their bank accounts. These efforts initially were successful but eventually were overturned by the U.S. Court of Appeals in *United States v. Thurston County*.[17]

Unfortunately, two federal acts passed by Congress between 1910 and 1916 proved more detrimental to the Omaha tribe. In 1910, Nebraska Senator Norris Brown pushed a bill ("The Brown Act") through Congress which subjected all Omaha lands allotted prior to 1885 to be taxed for "local, school district, road district, county, and state purposes," and if these taxes were not paid, the Secretary of the Interior could pay such taxes from any funds that were held in deposit in the accounts of individual Omahas whose lands were still held in trust status. All "competent" Omahas promptly withdrew their funds from banks, but "incompetent" Omahas, whose accounts were controlled by the federal government

were vulnerable, since they could not withdraw funds without federal permission. Not surprisingly, these less fortunate Omahas bore the brunt of this taxation.[18] Six years later (1916), Senator Brown and Nebraska Congressman Daniel Stephens steered another bill through Congress (the Brown-Stephens Act) which applied the taxation provisions of the 1910 Brown Act to Omaha lands allotments issued in 1885 and after. Although Indians lands held in trust on almost all other reservations in the United States were not subject to such state or local taxation, Omaha allotments still held in trust were vulnerable to state or local taxation due to the special provisions of the Brown and Brown Stephens acts.[19]

For the past two hundred years Omaha lands, resources, and sovereignty have been repeatedly besieged and threatened by federal officials, state and local politicians, and by non-Indians residing upon the Omaha Reservation. The current attempt by the plaintiffs to alter the western boundary of the Omaha Reservation is just the latest chapter in this sad and sordid saga. Greenwald's report conveniently chooses to ignore these important facets of Omaha history and fails to place the attempts by the plaintiffs to alter the western boundary of the Omaha Reservation in its proper historical context.

2. Greenwald's assumption that the Act of 1872 changed the western boundary of the Omaha Reservation is incorrect. The Act of 1872 did not

transfer land from the Omaha Reservation to the federal government. The Act only attempted to delineate a portion of land on the western side of the reservation which was offered (unsuccessfully) to non-Indians. The Act stated that this land would be set aside from other reservation land which obviously would not be opened to white settlement. In discussing these lands, the Commissioner of Indian Affairs refers to them (and lands offered for sale by the same Act on the Pawnee, Otoe and Missouria, and Sac and Fox of the Missouri) as "lands offered ***within***" these reservations.[20]

In addition, the bloc of reservation lands unsuccessfully offered for sale to non-Indians following the 1872 Act incorporated a different bloc of land from the reservation lands sold following the 1882 Land Act. This second bloc of land is described as lands "lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company" The lands offered for sale in 1873 were defined as "not exceeding fifty thousand acres," and located west of "a line running along the sections lines from north to south."[21] Just where this "north-south" line was to be drawn remains uncertain, and Greenwald provides no map indicating the line's location, but it certainly differed from the boundaries set forth in the 1882 Land Act. As federal and commercial maps from this period illustrate, the railroad crosses the southwestern quadrant of the Omaha Reservation on a general southeast to northwest direction.[22] It does not follow north-south section lines. The land Acts of

1872 and 1882 described different blocs of lands. Greenwald's assumption that the reservation lands sold to non-Indian settlers after the 1882 Land Act were defined in the 1872 Land Act is incorrect.

More important, however, is the description of the reservation lands that federal officials listed and offered for sale as the result of the 1872 Land Act. As Greenwald fails to mention, these lands were described and advertised as still being part of the Omaha Reservation. A survey of advertisements placed by federal officials in newspapers in both Omaha and in major cities in the eastern part of the United States specifically stated that "these lands comprise the western part of the reservation of the Omaha Indians in the State of Nebraska."[23] Moreover, correspondence from the commissioners who appraised these lands for sale also illustrates that these commissioners considered the land to still be part of the Omaha Reservation.[24]

In addition, as Greenwald admits, almost none of these lands ever were sold. Of the approximately fifty thousand acres which evidently were surveyed and appraised, the federal government sold only two tracts totaling 300.72 acres.[25] Title to the remaining lands was not transferred to the United States, nor to individual settlers. No money changed hands. Both the lands and hegemony over them continued to reside with the Omahas. In addition, as Greenwald's report points out, the tract book in which these tracts are listed was "prepared in conjunction with the appraisal of land ***pursuant*** to the 1872 Act" and was entitled

"Omaha Indian Reservation in Nebraska."[26] In other words, again, by the government's own admission, the tracts that were appraised and offered for sale under the 1872 Act were on, not apart, from the Omaha Indian Reservation.

Ironically, after the federal government failed to sell these western reservation lands to non-Indian settlers, the Omahas offered to allow the Poncas to purchase allotments and settle in the same region. Again, unlike the sale of lands to the Winnebagos, the Omahas did not offer to relinquish hegemony over the region, but rather, "to sell lands to the tribe in allotments to members in sufficient quantity for its wants at a fair price." The Poncas agreed and asked federal officials for permission to move to the western end of the Omaha Reservation, but federal officials refused and eventually removed the Poncas to Indian Territory.[27] **The abortive sale of lands to the Poncas mirrored the unsuccessful sale of lands to non-Indians in 1872. In both cases, the Omahas were willing to sell individual tracts or allotments on the western end of their reservation, but unlike their cession of lands in 1865 and 1874 to the federal government for use by the Winnebagos, the Omahas did not cede any lands to the United States. They retained control of the western part of their reservation.**

Finally, the legislative history of the 1882 Land Act, in which members of Congress repeatedly discussed the lands west of the railroad right-of-way

(which included almost all the lands previously offered for sale in 1872), make no mention of these lands not being on the Omaha Indian Reservation. Indeed, although THE CONGRESSIONAL RECORD contains numerous references to lands west of the railroad in the congressional debates and discussions that led to the 1882 Land Act, no member of Congress indicated that the legislation passed in 1872 diminished the reservation at all.[28] In 1882, the assumption by members of Congress was that the 1872 Act had had no impact upon the dimension of the Omaha reservation. **Obviously, in 1882 members of Congress envisioned the lands unsuccessfully offered for sale following the Act of 1872 as still part of the Omaha Indian Reservation.**

In conclusion, although Greenwald spends three pages discussing the 1872 Land Act, **this legislation has no bearing on the western boundary of the Omaha Reservation**. Lands on the western portion of the Omaha reservation already had been surveyed (1867), and although these lands were appraised sometime in the six months that followed the Act, only two small tracts totaling 300.7 acres were sold to non-Indians. The 1872 Land Act mentions a vague and indistinct "line running along the sections lines from north to south," but this line was never delineated. Reservation maps from the 1870's do not portray any such change in the western border of the reservation. In contrast, advertisements formulated by the federal government in its futile attempts to sell these lands list this region as still part of the

Omaha Indian Reservation. Although Greenwald subtitles her discussion of the 1872 Act as "The 1872 Land Sale," in essence (with the exceptions of two small tracts totaling only 300.7 acres) no lands were sold. Indeed, the 1872 Act contained no explicit language indicating the total surrender of all tribal rights to the region in which the lands were offered for sale. The act contained no explicit language indicating a relinquishment of title to the lands for a specific sum of money. The act returned no land to the public domain. The act contained no indication that the Omaha people would not have access to the region, not any indication what might happen to any individual acreages that were not sold. **The 1872 Act is a moot point. The 1872 Act neither transferred any land from Omaha control, nor sold any appreciable amount of land on the western portion of the reservation.**

3. Greenwald fails to compare the language encompassed in the Omaha sale of reservation lands for use as a Winnebago Reservation with the 1882 Land Act. Greenwald briefly mentions that in 1865 "the Omahas agreed to sell a portion of their reservation to the United States" to be used as a reservation for the Winnebagos, and incorrectly states that in 1874 the Omahas sold an additional twenty sections of land "to the Winnebagos" which was then added to the Winnebago Reservation.[29] In both of these transactions, the Omahas sold their lands to the United States. More important however, in these two transactions the language describing the sales clearly indicates that the size of their reservation

would be diminished. The transfer of land in 1865 was facilitated through a treaty between the Omahas and the United States in which the Omahas "do hereby cede, sell, and convey to the United States a tract of land from the north side of their present reservation . . . It being understood that the object of the Government in purchasing the land herein described is for the purpose of locating the Winnebago tribe thereon. . . ."[30] In the second sale of land (1874) the Omahas also "convey(ed) to the United States in trust for the Winnebago tribe of Indians all the right, title, and interest of the Omaha Indians in and to" the additional twenty sections of land on the northeastern corner of their reservation.[31] In both of these transactions the Omahas clearly ceded or sold a portion of their reservation to the United States which the federal government then used to establish and enlarge a reservation for the Winnebagos.

In contrast, the language incorporated in the 1882 Land Act makes no reference to any sale or cession of lands to the federal government, nor any surrender of tribal rights, title, or interest to the region. The 1882 acts simply states that the Omahas agree that the Secretary of the Interior is authorized to survey and sell "all that portion of their reservation in the State of Nebraska lying west of the right of way of the Sioux City and Nebraska Railroad Company," and that any lands not initially allotted to Indians in that region would be open to settlement. Settlers could then purchase up to one hundred and sixty acres of these lands through the public land office at Neligh Nebraska. Any funds from such sale

would be placed in a special account established for the Omaha Tribe and managed by the Secretary of the Interior.[32]

Greenwald fails to point out the significant difference in the language encompassed in the sale of lands to the government for use as a Winnebago reservation and the 1882 Land Act. The sale of lands in 1865 and in 1874 by the Omahas to the federal government clearly illustrate that the Omahas were relinquishing any claims to sovereignty over the lands they were relinquishing. Those lands would no longer be part of the Omaha Reservation. They were being surrendered to the federal government, who could use them for its own purposes. The Omaha intent in these two land sales was crystal clear. They had no intention of retaining these former parts of their reservation. Indeed, the sale of the lands to the government for use as part of the Winnebago Reservation clearly diminished the Omaha Reservation.

In contrast, the language of the 1882 Act was entirely different. The 1882 Land Act did not mention any cession by the Omahas of land, nor any conveyance of "all the right, title, and interest" in lands that the federal government would later offer to settlers.[33] **In the 1882 Land Act, the Omahas simply enabled the federal government to again offer and sell individual tracts of land on the western portion of their reservation to individuals, many of whom would be non-Indians.** If either Congress or the Omahas had intended to relinquish all tribal claims over lands west of the

railroad they most certainly would have included such language in the 1882 Land Act. Both federal officials and the Omahas were aware that land sales to the government for the Winnebago Reservation had established precedents for such a transfer, but obviously, as Greenwald fails to point out, such language is singularly lacking in the 1882 Land Act. **Unlike the sale of Omaha lands to the federal government in 1865 and 1874, the 1882 Land Act contained no explicit language indicating the total surrender of all tribal rights to the region west of the railroad right of way.** It contained no explicit language indicating a relinquishment of title to the lands for a specific sum of money. The Act returned no land to the public domain. The Act contained no indication that the Omaha people would not have access to the region. Indeed, it specifically stated in section eight of the act that the Omahas were authorized to select allotments within the region west of the railroad. Moreover, the Land Act of 1882 did not specifically state what would happen to those individual acreages within the region which were not sold. ***The 1882 Land Act did not diminish the Omaha Reservation.***

4. Greenwald's discussion of the 1882 Land Act and the subsequent sale of lands to settlers on the Omaha Reservation fails to include how these lands are repeatedly described and portrayed by federal officials, missionaries, and settlers in the two decades following the passage of the 1882 Land Act. As pointed out in

Sections 2. and 3. above, the language embodied in both the Congressional debates focusing on the Land Act of 1882, and the language in the Act itself, provides no indication that the Omaha tribe intended to permanently transfer Omaha Reservation land to the federal government nor surrender any tribal sovereignty over such land to the federal government. The 1882 Land Act merely provided for the sale of lands on the western portion of the Omaha Reservation to individual land holders, the majority of whom would prove to be non-Indians.

With few exceptions, description of these lands in the two decades following the passage of the 1882 Land Act repeatedly describe this region as continuing to remain a part of the Omaha Indian Reservation. On page 17 of her report Greenwald states that "In his annual report for 1883 Commissioner Price noted that a three-person commission was appraising the land to be sold." What she fails to include is that the document from which the quote is taken, in fact the very paragraph in which Price mentions the appraisal, also describes the lands to be appraised as "**that portion of the Omaha Indian Reservation** in the state of Nebraska lying west of the right of way of the Sioux City and Nebraska Railroad Company."[34] On page 18 of her report, Greenwald quotes the ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS for 1884 to illustrate that the lands west of the railroad were "thrown open to settlement" on April 30, 1884, but again she fails to mention that in this document,

these lands are described as **"Omaha Reservation Lands in Nebraska west of the Sioux City and Nebraska Railroad"**.[35]

Other omissions also are misleading. On page 19 of her report Greenwald briefly mentions that Congress authorized an extension of payment to settlers who had occupied the lands west of the railroad right of way, but who had failed to meet their yearly payments. In fact, these payment extensions which were authorized in 1885, 1886, 1888, 1890, and 1894, do indeed extend the settlers' time for payments, but they also explicitly state that **the lands which the settlers are purchasing, and upon which they are residing are located *"in," "on,"* or *"upon"* the Omaha Reservation.**[36] Greenwald also fails to mention that in 1894, before extending the payment period for settlers who had purchased lands **"on the Omaha Indian Reservation,"** Congress tacitly acknowledged that the region still belonged to the Omahas since they added a provision to the extension act stating that **"this Act shall be of no force and effect until the consent of the Omaha Indians be obtained."**[37] Commissioner of Indian Affairs Daniel Browning opposed soliciting the Omahas' consent, but ironically, the settlers residing on these reservation lands insisted and the Bureau of Indian Affairs acquiesced. In December 1895, William Beck, the Omaha Indian Agent, met with the Omahas in council and obtained their permission.[38] **Obviously, Congress, settlers living on the Omaha Reservation west of the railroad right of way, and the**

Omahas themselves continued to envision this region as part of the Omaha Reservation.

Greenwald quotes Indian Agent George "Wilson" (actually George Wilkinson) to illustrate that he envisioned the land west of the railroad right of way as being removed from the reservation, but she fails to put these quotes in context. On page 19 of her report Greenwald states that "Wilson" (Wilkinson) reported that "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers . . . ," but she omits that in the same letter Wilkinson also states that the reservation continued to extend twenty five miles west from the Missouri River, which would include the lands west of the railroad.[39] Greenwald also fails to mention that other Omaha Indian agents also described the reservation as including the lands west of the railroad right of way. In 1897, Indian Agent W. A. Mercer reported that the Omaha Reservation stretched thirty miles west of the Missouri, while two years later (1899) Agent Charles P. Mathewson also described the reservation as extending thirty miles west from the Missouri River and containing "about 140,000 acres," an acreage report which obviously included lands west of the railroad."[40] Moreover, in 1900, Secretary of the Interior Ethan Allen Hitchcock, relying upon advice from the U.S. Attorney General's Office, ruled that settlers who had purchased lands west of the railroad on the Omaha Reservation were not subject to homestead legislation since they were settled on lands "***in* the Omaha**

reservation."[41] Although Greenwald does not include references to such information, the language incorporated by Congress and other public officials in correspondence and legislation focusing upon the extension of the payment for lands west of the railroad right of way indicates that Congress continued to envision this region as part of the Omaha Indian Reservation.

5. Greenwald's discussion of the allotment of Omaha Reservation lands following the passage of the 1882 Land Act, and the events surrounding this allotment process, is misleading and incomplete. The 1882 Land Act had little support among rank and file Omahas. Its support among the Omahas originated from a "progressive" minority of the tribe led by the La Flesche family, and championed by anthropologist Alice Fletcher. In 1881, Alice Fletcher met with members of the progressive faction who asked her for assistance in obtaining a "strong paper" so they could secure title to their tribal homeland. As historian Judith Boughter has pointed out, Fletcher misunderstood the request for a "strong paper" as a request for allotment, and since the allotment of reservation lands was a concept popular among eastern reformers in the 1880's, she drafted a petition which fifty-three members of the progressive faction signed, then Fletcher sent the petition on to Congress.[42] In her report, Greenwald presents this petition as representing the aspirations of the majority of the Omaha tribe ("Fletcher took up the Omaha

cause, helping the tribe draft a petition") although the source she cites as her authority clearly illustrates that the petition represented only the perspective of the progressive faction, a decided minority within the tribe.[43]

Greenwald fails to mention that there is extensive documentation that most Omahas did not support the allotment process. Presbyterian missionaries active on the Omaha reservation during the allotment period (reformers who also urged the Omahas to adopt non-Indian ways) stated that most members of the tribe just wished to "keep up their tribal relations," and "continue to be Indians." They also reported that while a few Omaha chiefs were willing to remove to Oklahoma, other Omahas just "wish to keep their reserve," and "live as Indians."[44] As Judith Boughter has pointed out, many traditional Omahas banded together in an organization known as the "Council Fire" and actively opposed Fetcher's allotment efforts. A traditional medicine man held a ceremony against her and after Fletcher became ill many Omahas believed that the shaman's medicine had been effective. Since many Omahas refused to enroll for allotment, Indian agents ordered the tribal police to round up these more traditional tribespeople and conduct them to Fletcher's bedside where she forced allotments upon them.[45] **Indeed, as Greenwald fails to point out, the majority of the Omaha tribe had little interest in allotment. By Fletcher's own admission, at least two-thirds of**

the Omaha people originally opposed the allotment of their reservation.[46]

6. Greenwald's discussion of the assignment of Omaha allotments following the 1882 Land Act fails to indicate that although Congress did not deny the Omaha people access to lands west of the railroad, Alice Fletcher and Commissioner of Indian Affairs Hiram Price used all their influence to persuade or prevent the Omahas from taking allotments in this region. In the final sentence in SEC. 8 of the 1882 Land Act, Congress specifically stated "That said Indians (the Omahas) or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."[47] In other words, Congress was perfectly willing for the Omaha people to settle and reside west of the railroad right-of-way. In contrast to Congress, Commissioner of Indian Affairs Hiram Price strongly discouraged tribespeople from selecting lands in that region. To her credit, Fletcher did advise the Omahas to choose allotments in the Logan Creek Valley east of the right of way, since by her own admission "all the best farming land" was located "on the prairie on the western part of the reservation,"[48] but following Price's directives she discouraged the Omahas from choosing any allotments on the fertile prairies west of the railroad. Ostensibly, according to Price, the clustering of allotments east of the railroad was to prevent land speculators from gaining control of

allotments west of the right-of-way,[49] but in reality the location of the allotments had little to do with their eventual vulnerability to non-Indian land speculators. As the subsequent history of the Omaha reservation proved, speculators had little difficulty in gaining access to Omaha lands, regardless of their location. Instead, the lands west of the railroad were envisioned as "tracts of extra value"[50] and particularly attractive to non-Indian settlers. Indeed, when individual Omahas who already had been assigned allotments attempted to purchase additional tracts west of the railroad (after these western reservation lands were opened to settlement), they were prevented from doing so. Although an examination of Congressional debates preceding the passage of the Land Act of 1882 illustrates that Congress envisioned that individual Omahas would purchase lands west of the railroad[51], Greenwald's documentation illustrates that Price forbid them to do so. Price begrudgingly allowed individual Omahas to select allotments west of the right of way, but he ruled that they should not be allowed to purchase any additional acreages in that region since the remaining acreages west of the railroad were to be sold only to American citizens.[52] The Omahas were Indians. They were not citizens, so in Price's opinion they were ineligible. **Regardless of Congressional intent, neither Price nor politicians from the new state of Nebraska wanted the Omahas to settle or purchase reservation lands west of the railroad. These reservation lands, described as "the cream of all that reservation,"[53] were to be sold only to white people.**

7. Greenwald's discussion of the "Settlement of the Opened Lands" fails to mention that members of the Omaha tribe played key roles in the early history of both Thurston County and Pender, Nebraska. As Section No. 6 above illustrates, following the passage of the 1882 Land Act and the subsequent allotment and sale of reservation lands, large numbers of Omahas did not settle west of the railroad right of way. They were discouraged from settling on reservation lands in this region by allotment agents, and although Congress intended that they should be able to purchase individual acreages in this region, they were forbidden to buy lands west of the right of way by the Commissioner of Indian Affairs.[54] Moreover, among the Omahas, kinship ties have always been strong. Most preferred to remain in some proximity to other members of their family. Greenwald states that "at the end of 1883" ten tribal members had selected allotments west of the railroad and that one year later 876 acres had been selected by Omaha allottees in that region.[55] An examination of allotment maps and lists of allottees complied by the Bureau of American Ethnology in 1905-1906 and published in the TWENTY-SEVENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY indicates that at least fifteen allotments were located entirely or partially west of the railroad, and that these separate allotments were assigned to at least thirteen individual Omahas. Acreage estimates are difficult to ascertain from the allotment maps, but the allotments totaled about nine hundred and thirty five acres.[56]

More important however is Greenwald's failure to point out the leading role played by members of the Omaha tribe in the early history of Pender and Thurston County. Obviously, Omaha tribespeople living in the Logan Creek region visited and traded in Pender,[57] but **others resided in and owned places of business in the village**. Between 1890 and 1895 Thomas Sloan, an attorney and a member of the Omaha tribe, maintained both a residence and a law office in Pender where he employed Omahas as clerical assistants and evidently met with both Omaha and non-Indian clients.[58] Hiram Chase, another attorney and member of the Omaha tribe also resided and practiced law in Pender, where his children attended public schools.[59] Moreover Sloan, Chase, and other Omahas actively participated in Thurston County politics. **Omaha tribal member Thomas Sloan was elected mayor of Pender.** He also served two terms as a member of the Pender village Board of Trustees. In addition, Sloan served as a Thurston County Surveyor, and as a Justice of the Peace. **Omaha tribal member Hiram Chase served as Thurston County Attorney for eight years before being elected County Judge.** By 1905, Simeon Hallowell, another member of the Omaha tribe, also had served as a Justice of the Peace, as a Thurston County Assessor, and as a member of the local school board.[60]

Greenwald's report spends two pages (pp. 22-23) describing the settlement of lands west of the railroad on the Omaha Indian Reservation and the founding

and subsequent growth of Pender Nebraska, but she fails to include any discussion of the role that the Omaha people played in these events. **Obviously, during the first two decades of Pender's existence Omaha tribespeople were active participants in the village's daily life. Indeed, Omaha tribesmen such as Thomas Sloan, Hiram Chase, and Simeon Hallowell played leading roles in both the economic growth and the political history of both Pender and Thurston County.**

8. Greenwald's discussion of the "Size of the Omaha Indian Reservation," which seems to be based upon a hodgepodge of federal statistics, is inconsistent and confusing. As Greenwald points out in her report, in 1871 the Office of Indian Affairs reported the Omaha Reservation as including 345,000 acres. Two years later, in 1873, this figure was changed to 200,000 acres. But that figure (200,000 acres) would indicate that the Omaha Reservation had been reduced by 145,000 acres, a total acreage which is almost three times more than Greenwald alleges were sold by the 1872 Act. Greenwald then quotes the Commissioner of Indian Affairs as stating in 1874 that the reservation contained 192,867 acres, but that 49,762 acres had been appraised for sale, leaving only 143,225 acres in the reservation. Yet Greenwald admits that one year later (1875) T. T. Gillingham, the Omaha Indian Agent stated that the reservation held "about 193,000 acres, including 50,000 acres offered for sale three years ago, but which failed to sell and is now held in trust

by the United States."[61] Meanwhile the lands in question (which never sold) were described by the appraisers or advertised by federal officials as still part of the reservation. Obviously, regardless of how statisticians in Washington listed the total acreage of the Omaha Reservation, Gillingham, officials in the field, and those responsible for selling the lands on the western portion of the Omaha Reservation continued to believe that this acreage remained part of the Omaha reservation. These lands are consistently described as **"Omaha Indian Reserve lands"** or as **"the western part of the Omaha Indian Reservation in the State of Nebraska."**[62]

Finally, in the last paragraph (page 26) of her section discussing acreage figures on the Omaha Reservation Greenwald contradicts herself and quotes federal statistics produced in 1935 which states that the alleged reduction of the acreage on the reservation did not occur in 1872, as she previously asserted, but rather it must have occurred following the passage of the 1882 Land Act, since the alleged reduction took place from the sale of lands "west of the railroad."[63] Such evidence negates much of her previous argument that such a reduction took place between 1872 and 1874 (following the 1872 Act) because the Sioux City and Nebraska Railroad right of way to which the statistician refers could not have been completed in 1872 (or 1874). The Omahas did not even sell the land for the railroad right of way until 1880.[64]

Obviously, statisticians employed by the federal government in Washington who compiled statistical information on the Omaha Reservation in Nebraska were confused about the acreage encompassed in the Omaha Indian Reservation. As Greenwald's report indicates, their estimates of reservation acreage range from 345,000 to 135,000 acres.[65] Moreover, Greenwald's focus for the alleged reduction of reservation acreage also is inconsistent. At first, she seems to focus upon the unsuccessful sale of lands associated with the 1872 Act, but then, on page 26, she relies upon a government report that alleges that acreage on the Omaha reservation was reduced only after the sale of reservation lands to non-Indian settlers which was initiated following the Land Act of 1882.[66]

Greenwald's report also indicates that the Omahas themselves remained very confused over the total acreage in their reservation. As Greenwald points out, in 1924 two Omaha delegates acting on behalf of the tribe petitioned the Commissioner of Indian Affairs, asking about the total acreage of land both sold and unsold on their reservation.[67] Their inquiry also suggests that they still envisioned lands west of the railroad right of way as part of the Omaha Reservation, for included with their inquiry was a copy of the appraisal of these reservation lands entitled "Description and Valuation **of that portion of the Omaha Indian Reservation lying west of the Sioux City and Nebraska Railroad Right of Way** as Appraised under authority of the act of Congress approved August 7, 1882, and Deficiency Act approved

March 3, 1883."[68] Obviously, this document which the Omahas submitted with their request refers to the lands west of the right-of-way as part of the Omaha Reservation. Unsure of the acreage himself, and evidently unwilling to rely upon figures already compiled by the Bureau of Indian Affairs, Commissioner Charles H. Burke wrote to the General Land Office asking about the number of acres west of the railroad right of way on the Omaha Reservation which were opened to white settlement following the Land Act of 1882. In reply, Commissioner William Spry of the Land Office informed Burke that **"detailed information regarding lands *on* that reservation, sold under the act of August 7, 1882"** indicated that 50, 157.24 acres **"of the *Omaha lands* ... were opened to homestead entry under the said acts of August 7, 1882 and March 3, 1883."**[69] Spry may have provided Burke with an accurate account of the total acreage settled by non-Indians following the Land Act of 1882, but he was incorrect in referring to such settlement as "homestead entry." In 1900 the Attorney General's Office of the United States already had ruled that settlers who had purchased land west of the railroad were not subject to homestead legislation since they were settled on lands **"in the Omaha reservation,"**[70] but the Omaha inquiry and the subsequent reply only illustrates the continued uncertainty and confusion about the size of the Omaha Reservation.

Statistics amassed by the federal government purporting to report the acreage on the Omaha

Reservation seem to be based upon misunderstood and poorly defined arbitrary boundaries selected by federal bureaucrats from a mélange of overlapping yet conflicting statutes which, unlike previous treaties, fail to clearly delineate federal intentions. **Greenwald's reliance upon these federal statistics to ascertain the acreage in the Omaha Indian Reservation is at best confused and unreliable.** To quote Mark Twain, "There are three kinds of lies: lies, damned lies, and statistics."[71]

9. Greenwald's discussion of the "Demographic History" of reservation lands west of the railroad right of way following 1900 only reveals a self-fulfilling pattern previously designed by the Bureau of Indian Affairs. On page 28 of her report Greenwald states that "The percentage of non-Indian population west of the railroad line has remained high since the early twentieth century. . ."[72] Yet as Greenwald's report and documentation illustrate, such a demographic pattern is not surprising since Commissioner of Indian Affairs Hiram Price first discouraged the Omahas from choosing allotments in that region, then specifically forbade them from purchasing lands west of the right-of-way because they were not American citizens.[73] Indeed, most Omahas were not American citizens until after the passage of the American Indian Citizenship Act in 1924, and by that time they could not afford to purchase these "tracts of extra value"[74] located on reservation land west of the railroad. In retrospect, after the Land Act of 1882, **policies initiated by the**

Commissioner of Indian Affairs subverted Congressional intent that the Omahas would have full access to lands west of the railroad and precluded the Omahas from settling in large numbers on reservation lands in that region.

It is ironic however, that although Greenwald uses United States Census Bureau statistics to argue that few Omaha People are resident on reservation lands west of the railroad,[75] she fails to include **recent Census Bureau maps which indicate that both Pender and the lands west of the railroad are part of the Omaha Indian Reservation.**[76] Greenwald also fails to mention that although the Thurston County Board of Supervisors specifically requested the U. S. Census Bureau to revise the boundaries of the Omaha Indian Reservation on its maps to exclude the lands west of the railroad from the reservation, the Census Bureau has refused. According to Robert A. LaMacchia, the Chief of the Geography Division of the U. S. Census Bureau, "**While land ownership may change on reservation lands, the reservation boundaries are clear and, as far as we are aware, no new legal opinion, federal court decision, Act of Congress, etc. has altered these boundaries.**"[77] Obviously, regardless of the demographic statistics it has compiled, **the U.S. Census Bureau considers the lands west of the railroad to be part of the Omaha Indian Reservation.**

10. Greenwald's discussion of the "Current Treatment" of the Omaha Reservation lands

west of the railroad right of way is based upon an unreliable 1989 opinion which recently was withdrawn and superseded by the Office of the Solicitor. In addition, Greenwald fails to address how the region continues to be envisioned by citizens of Thurston County. Greenwald indicates that over two decades ago, in a letter written on June 27,1989, Marcia Kimball, an employee in the Field Solicitor's Office of the Department of the Interior in Minneapolis indicated that "the most logical demarcation line for the western boundary of the Omaha Reservation" was the "centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way."[78] Yet on April 16, 2012 the Office of the Solicitor of the Department of the Interior withdrew Kimball's letter and informed the Field Solicitor in Minneapolis that Kimball's letter "is not to be relied upon or used by your office"[79] Instead, Patrice H. Kunesh, the Deputy Solicitor for Indian Affairs, has declared that a more recent analysis of the Land Act of 1882 conducted by Priscilla Wilfahrt should now supersede Kimball's 1989 letter. Wilfahrt's analysis, contained in a lengthy letter of April 24, 2008, concluded that "**the boundaries of the Omaha Indian Reservation have not been diminished.**" According to Kunesh, Wilfahrt's analysis is more accurate and should be used by the Solicitor General's Office in ascertaining the western boundary of the Omaha Reservation.[80] In other words, according to the Solicitor General's Office, the western boundary of the Omaha Indian Reservation, as delineated in the "Field Notes of the Boundary of the Omaha

Indian Reservation, June 27, 1855" continues to serve as the western boundary of the modern Omaha Indian Reservation.[81]

Greenwald also mentions that both Thurston County District Court and the Nebraska Attorney General's Office have issued opinions concluding that the lands west of the right of way are no longer part of the Omaha Reservation, yet these decisions have emerged from the District Court of Thurston County and from an elected official in the state government of Nebraska. Neither county nor state governments exercise final jurisdiction over federal Indian reservations. Indeed, in a letter delineating his opinion to the Nebraska Liquor Control Commission, Jon Bruning, the Attorney General of the State of Nebraska admitted that **"the determination of reservation boundaries is a federal matter,"** and that businesses in Pender which failed "to abide by the Tribe's ordinance or other regulatory efforts in the disputed territory may face legal consequences." According to Bruning, regardless of his office's opinion, **"this is an issue of federal law."**[82] Obviously, state, county, and local jurisdiction over the region west of the railroad right of way is, at best, uncertain.

Finally, perhaps the most telling omission by Greenwald in her discussion of the "current treatment" of the lands west of the railroad is how modern residents of Thurston County, and citizens of Pender, continue to envision the region. Although the plaintiffs in this case are residents of Pender and Thurston County and assert that Pender is not located on the

Omaha Indian Reservation, the County Government of Thurston County has continued to publicly proclaim a different opinion. For at least the last three years the county's official website has proudly proclaimed that **the Omaha and Winnebago reservations "are still in existence today, and cover the entire Thurston County area."**[83] Since Pender remains the county seat of Thurston County, by that government's own admission, **Pender remains on the Omaha Indian Reservation. That reservation has not been diminished.**

---

[1] A treaty of peace and friendship . between the United States of America and the Chiefs and Warriors of the Mahas . ," July 20, 1815, in Charles Kappler, comp. and ed., INDIAN TREATIES: 1778-1883 (Mattituck, N.Y.: Amereon House, 1972 – reprint), pp. 115-116; "Treaty with the Makah Tribe," October 6, 1825, IBID., pp. 260-262; "Treaty with the Omaha," March 16, 1854, IBID., 611-614.

[2] George Hepner to Alfred Cummings, November 12, 1854, Letters Received, Office of Indian Affairs, M234, Roll 218, 130. Hereafter microfilmed documents from the Letters Received File of the Office of Indian Affairs will be cited by NARS, File number, Roll number and frame numbers; i.e. (NARS, M234, Roll 218, 130). Hepner to Cummings, May 17, 1855, IBID., 273; Alice C. Fletcher and Francis La Flesche, THE OMAHA TRIBE (2 vols.; Lincoln: University of Nebraska Press, 1992 – reprint), Vol 1, pp. 100-101. Also see J. B. Robertson to George Manypenny, October 1, 1855, M234, Roll 218, 380-381; and Judith Boughter, BETRAYING THE OMAHA NATION, 1790-1916 (Lincoln: University of Nebraska Press, 1998), p. 72-75.

[3] Articles of a treaty . made and concluded by the United States . and the Sacs and Foxes; . . . the Sioux; the Omahas, Ioways, Ottoes and Missourias," July 15, 1830, in Kappler, INDIAN TREATIES, pp. 305-310; Boughter, BETRAYING THE OMAHA NATION, pp. 35-37; Tanis Thorne, THE

MANY HANDS OF MY RELATIONS: FRENCH AND INDIANS ON THE LOWER MISSOURI (Columbia: University of Missouri Press, 1996), p. 194.

[4] Boughter, BETRAYING THE OMAHA NATION, pp. 35-37.

[5] "Gatewood Treaty" January 27, 1854, M234, Roll 218, 195-199.

[6] "Treaty with the Omaha," March 16, 1854, Kappler, INDIAN TREATIES, pp. 611-614.

[7] "Treaty with the Omahas," March 6, 1865, Kappler, INDIAN TREATIES, pp. 872-873; H. B. Denman to N. G. Taylor, February 8, 1868, M234, Roll 605, 812-814; Omaha chiefs to the President, February 8, 1868, IBID; George Doane to the Commissioner of Indian Affairs, November 19, 1866, IBID, 367-368; Robert Furnas to E. B. Taylor, December 3, 1865, IBID., 407-410.

[8] Extract from inspections made by Inspector W. W. Jenkins on the Omaha and Winnebago reservations, May 29 and June 2, 1890, enclosure in T. J. Morgan to the Secretary of the Interior, February 26, 1891, in U. S. Congress, Executive Document No. 73, 515t Cong., 2nd Sess., pp. 1-7; "Trouble With Leasing on Omaha and Winnebago Reservations, Nebraska, in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS FOR THE YEAR 1895 (Washington: Government Printing Office, 1895), pp. 37-41. Hereafter the ANNUAL REPORT OF INDIAN AFFAIRS will be cited as ARCIA, followed by the year of that publication: i.e. ARCIA, 1895. Also see Boughter, BETRAYING THE OMAHA NATION, pp. 137-141.

[9] "Trouble With Leasing on Omaha and Winnebago Reservations, Nebraska," in ARCIA, 1895, pp. 37-41; William Beck to the Commissioner of Indian Affairs, August 20, 1895, in IBID., pp. 199-201; Detailed secondary accounts of these events can be found in Norma Kidd Green, IRON EYE'S FAMILY: THE CHILDREN OF JOSEPH LA FLESCHE (Lincoln: Nebraska State Historical Society, 1969), 88-96, and in Boughter, BETRAYING THE OMAHA NATION, pp. 143-152.

[10] THE PENDER TIMES, April 11, 1902, p. 1; IBID., July 25, 1902, p. 1; IBID., October 3, 1902, p. 1; Boughter, BETRAYING THE OMAHA NATION, pp.172-179.

[11] "An act to amend section six of an act approved February eighth, eighteen hundred and eighty seven. ", May 8, 1806, U. S. STATUTES AT LARGE, 34, 181-182.

[12] Petition by the Omahas, April, 1906, National Archives and Record Service – Kansas City Branch, Winnebago Agency, Box A-105. Hereafter materials from the Kansas City branch of the National Archives will be cited as NARS-KC. Also see Boughter, BETRAYING THE OMAHA NATION, pp. 177-179.

[13] Janet A. McDonnell, "Land Policy on the Omaha Reservation: Competency Commission and Forced Fee Patents," NEBRASKA MAGAZINE OF HISTORY, Vol. 63 (Fall, 1982), pp. 400-402.

[14] McDonnell, "Land Policy on the Omaha Reservation," pp. 402-404; THE PENDER TIMES, October 15, 1909, p. 1.

[15] McDonnell, "Land Policy on the Omaha Reservation," pp. 404-409; Boughter, BETRAYING THE OMAHA NATION, pp. 182-185.

[16] "Report of E. B. Lineham, Chief Inspector, and E. H. Sweet, Jr., Inspector, on the Omaha Reservation, Nebr., March 31, 1915, in Richmond Clow Papers, University Archives, University of Omaha at Lincoln. Hereafter, documents from this source will be cited as Clow Papers, UNO. Also see McDonnell, "Land Policy on the Omaha Reservation," pp. 405-408; and Boughter, BETRAYING THE OMAHA NATION, pp. 185-190, 203.

[17] THE PENDER TIMES, June 23, 1905, P. 1; IBID, June 30, 1905, p. 5; IBID., July 28, 1905, p. 1; Boughter, BETRAYING THE OMAHA NATION, pp. 196-198.

[18] Act of May 6, 1910. A copy of this act is in Box 38, FRD Box 268, Accession 75-92-E-007, Winnebago Agency, NARS – KC.

[19] "An Act Providing for the taxation of the lands of the Winnebago Indians and the Omaha Indians in the State of Nebraska," December 30, 1916, in U.S. STATUES AT LARGE, 39, pp. 865-866; THE PENDER TIMES, December 22, 1916, in

Clow Papers, UNO; Boughter, BETRAYING THE OMAHA NATION, pp. 201-203.

[20] "An Act for the Relief of Certain Indians in the Northern Superintendency," June 10, 1872, U. S. STATUTES AT LARGE, 17, 391-393. Hereafter this act will be cited as "Act of 1872."

[21] "An act to provide for the sale of part of the Omaha Reservation," August 7, 1882, U.S. STATUTES AT LARGE, 22, pp. 341-343; Hereafter this act will be cited as "Omaha Land Act of 1882." Also see Act of 1872, 85-86.

[22] "Diagram Showing the Township lines, Guide meridian, 6th Standard Parallel, and the Boundary Lines of the Omaha and Winnebago Ind. Res. In Nebraska," January 31, 1884. A copy of this map is in the possession of David Wishart, Professor of Geography, University of Nebraska, Lincoln, Nebraska. Also see ENCYCLOPEDIA BRITANNICA (Chicago: Encyclopedia Britannica, 1895), Nebraska Plate; ENLARGED SHIPPING ATLAS AND SHIPPING GUIDE (Chicago: Rand-McNally Co., 1902); Nebraska Plate; NEBRASKA (Chicago: Rand-McNally Co., 1911), Nebraska Plate.

[23] Advertisement in CINCINNATI TIMES AND CHRONICLE, April, 1873, in National Archives, M234, Roll 606, 393-394; Advertisement in the NEW YORK INDEPENDENT, April 17, 1873, IBID., 402; Advertisement in the OMAHA REPUBLICAN, April 19, 1873, in IBID., 449-450; Advertisement in the CHICAGO POST, May, 1873, IBID., 460-461.

[24] Elam Clark to the Secretary of the Interior, July 3, 1873., National Archives, M234, Roll 606, 382.

[25] Greenwald, "The Western Boundary of the Omaha Indian Reservation," pp. 9-11

[26] IBID.

[27] Minutes of a meeting between the Omahas and Poncas, November 6, 1873, M234, Roll 606, 663-664; Barclay White to Edward Smith, September 5, 1874, IBID., 846; David J. Wishart, AN UNSPEAKABLE SADNESS: THE DISPOSSESSION OF THE NEBRASKA INDIANS (Lincoln: University of Nebraska Press, 1994), 206-208.

[28] CONGRESSIONAL RECORD: CONTAINING THE PROCEEDINGS AND DEBATES OF THE FORTY-SEVENTH

CONGRESS, FIRST SESSION, Vol. XIII (Washington: Government Printing Office, 1882), pp. 3027-3032, 3077-3079, 6537-6542, 6571-6573, passim.

[29] Greenwald, "Western Boundary of the Omaha Indian Reservation, pp,. 8, 11.

[30] "Articles of a Treaty made and concluded at Washington, D. C.," March, 6, 1865," in Kappler, INDIAN TREATIES, pp. 872-873.

[31] Deed of Conveyance, July 31, 1874, NARS, M234, Roll 606, 839-842.

[32] "An act to provide for the sale of a part of the Omaha Reservation," August 7, 1882, U.S. STATUTES AT LARGE, 22, pp. 341-342.

[33] "Articles of a Treaty made and concluded at Washington, D. C.," March 6, 1865, in Kappler, INDIAN TREATIES, 872-873; Deed of Conveyance, July 31, 1874, NARS, M234, Roll 606, 839-840.

[34] Greenwald, "Western Boundary of the Omaha Indian Reservation, p. 17; ARCAI. 1883, LXIII. This document is listed as footnote No. 81 in Greenwald's report. Bold type in quote inserted by author.

[35] Greenwald, "Western boundary of the Omaha Indian Reservation, p. 18; ARCIA, 1884, XLVIII. This document is listed as footnote No. 86 in Greenwald's report. Bold type in quote inserted by author.

[36] "An Act authorizing the Secretary of the Interior to extend the time of payment for purchasers of lands of the Otoe and Missouria and Omaha Indians," August 2, 1886, in ARCIA, 1886, p. 276; "An Act for the relief of the Omaha tribeon Indians in Nebraska, to extend time of payment to purchasers to lands of said Indians, and for other purposes," May 15, 1888, U.S. STATUTES AT LARGE, 25, pp150-151; "An act extending the time of payment for purchasers on land of the Omaha tribe of Indians in Nebraska, and for other purposes," August 19, 1890, in ARCIA, 1890, p. 894; "An Act extending the time of payment to purchasers of lands of the Omaha Indian tribe in Nebraska and for other purposes," August 11, 1894, in ARCIA, p. 438.

[37] "An Act extending the time of payment to purchasers of land s of the Omaha Indians in Nebraska, and for other purposes," August 11, 1894, in ARCIA, 1894, p. 438. Also see "Time of Payment for lands of Omaha Indians in Nebraska," Report from the Committee on Indian Affairs" May 24, 1894, U.S. Congress, House of Representatives, 53rd Congress, 2nd Session, Report No. 958, pp. 1-3. Bold type in quote inserted by author.

[38] "Extension of Payment for Omaha Lands, in ARCIA, 1896, p. 88.

[39] Greenwald, "Western Boundary of the Omaha Indian Reservation," p. 19; George Wilkinson to the Commissioner of Indian Affairs, September 18, 1885, in ARCIA, 1885, pp. 135-136.

[40] W. A. Mercer to the Commissioner of Indian Affairs, August 24, 1887, in ARCIA. 1897, pp.178-180; Charles P. Mathewson to the Commissioner of Indian Affairs, August 31, 1899, in ARCIA, 1899, pp. 231-23

[41] Opinion by E. A. Hitchcock, June 23, 1900, 30, Public Lands, Dec. 82, 1900 WL 1827 (D.O.I). Bold type in quote inserted by author.

[42] Boughter, BETRAYING THE OMAHA NATION, pp. 99-100.

[43] Greenwald, "Western Boundary of the Omaha Reservation," p. 13; Mark Awakuni-Swetland, "'Make-Believe White Men' and the Omaha Land Allotments of 1871-1900,"GREAT PLAINS RESEARCH: A JOURNAL OF NATURAL AND SOCIAL SCIENCES, 4 (August, 1994), 214.

[44] William Hamilton to John Lowrie, April 15, 1878, PRESBYTERIAN MISSION LETTERS, Box E, Reel 1, Letter 39.

[45] Boughter, BETRAYING THE OMAHA NATION, pp. 88-93.

[46] IBID. p. 93.

[47] "An Act to provide for the sale of a part of the Omaha Reservation," August 7, 1882, in U.S. STATUTES AT LARGE, 22, pp. 341-342.

[48] Alice Fletcher to J. E. Rhoads, April 7, 1887, quoted in Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 17.

[49] Hiram Price to Alice Fletcher, May 7, 1883, Box 3, Series 3, Correspondence on Specific Subjects, 1881-1925, MS 4558, National Anthropological Archives, Suitland Maryland. This document is cited in footnote No. 73 in Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 16.

[50] IBID.

[51] CONGRESSIONAL RECORD, 47 Congress, 1st. Sess., pp. 3027-3032, 3077-3079; 6537-6542, 6571-6573, passim.

[52] Hiram Price to Alice Fletcher, February 21, 1884, Alice Fletcher Papers Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4458, National Anthropological Archives, Suitland, Maryland. Hereafter, documents from this collection of correspondence will be cited as the Fletcher Papers. This document is cited in footnote No. 83 in Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 18.

[53] CONGRESSIONAL REGISTER, 47 CONGRESS, 1ST SESSION, p. 3032

[54] Price to Fletcher, February 21, 1884, Box 3, Series 3. Fletcher Papers

[55] Greenwald, "The Western Boundary of the Omaha Indian Reservation," pp. 17-18.

[56] "Original Owners of Allotments on Omaha Reservation, "Alice Fletcher and Francis LaFlesche, THE OMAHA TRIBE; TWENTY SEVENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY (Washington: Bureau of American Ethnology, 1911), 643-654. The map of the allotments can be found is included as "Plate 65." This list and plate was not included when this volume was reprinted by the University of Nebraska Press in 1992. Copies of the map can be found at http://www.accessgeneaology.com/native/omaha_indians/reservation_map 9hvm; and http://www.accessgeneaology.com/native/omaha_indians/reservation map7.htm.

[57] Rachel Beck to Edward Farley, August 21, 1894, La Flesche Family Papers, Nebraska State Historical Society,

Lincoln, Nebraska; Entry for March 16, 1898, Rosalie Farley's Diary, IBID.

[58] Frederick E. Hoxie, "Thomas Sloan and the "Good Citizenship Gun," pp. 17-24. This is an unpublished manuscript in the possession of Frederick E. Hoxie. Also see In'aska (Dennis Hastings) and Margery Coffey (Mi'onbathin), "Grandfather Remembers: Broken Treaties/Stolen Land: The Omaha Land Theft" (unpublished Ph.D. dissertation, Western Institute of Social Research, 2009), p. 751.

[59] THE PENDER TIMES, October 29, 1909, p. 1.

[60] "Thomas 'Thomas Sloan," pp. 26, 32; THE PENDER TIMES, October 29, 1901, p. 1; In'aska and Coffey, "Grandfather Remembers," p. p. 751.

[61] Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 24.

[62] "Elam Clark to the Secretary of the Interior, July 3, 1873, M234, Roll 606, 382; Advertisement in CINCINNATI TIMES AND CHRONICLE, April, 1, 1873, in IBID, 393-394; Advertisement in NEW YORK INDEPENDENT, April 17, 1873, in IBID., 402; Advertisement in OMAHA REPUBLICAN, April 19, 1973, IBID., 449-450; Advertisement in CHICAGO POST, May 1873, IBID., 460-461 Bold type in quote inserted by author..

[63] Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 26.

[64] William Pollock to Carl Schurz, April 20, 1880, U.S. Bureau of Indian Affairs, Aberdeen Area Office, Land Title and Records Office, 380 Railroad Negotiations. Hereafter documents from this archives will be cited as BIA, Aberdeen Office.

[65] Greenwald, "The Western boundary of the Omaha Indian Reservation," pp. 24-26.

[66] IBID. Also see William Spry to William Burke, June 17, 1924, File: 8269-1924-Omaha-313, Box 95, CCF 1907-1939, RG 75, National Archives. This document, which indicates that the precise acreage (50,157 acres) listed by the Winnebago Agency refers to lands sold following the Land Act of 1882, is cited in footnote 96 in Greenwald's report.

[67] Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 20.

[68] Elwood Harlan and Edward Cline to Commissioner of Indian Affairs, January 31, 1924, File: 8269-1924-Omaha-313, Box 95, CCF 1097-1939, RG 75, National Archives 1. This document is cited in Greenwald's report as footnote No. 95.

[69] Spry to Burke, June 17, 1924, File: 8269-Omaha-313, Box 95, CCF 1907-1939, RG 75, National Archives. This document is cited in Greenwald's report as footnote 96. Bold type in quote inserted by author.

[70] Opinion by E. A. Hitchcock, June 23, 1900, 30, Public Lands, Dec. 82, 1900 WL 1827 (D.O.I). Bold type in quote inserted by author.

[71] Mark Twain, AUTOBIOGRAPHY OF MARK TWAIN, ed. by Harriet Elinor Smith (Berkeley: University of California Press, 2010), Vol. 1, p. 228.

[72] Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 28.

[73] IBID., p. 18; Hiram Price to Alice Fletcher, February 24, 1884, Box 3, Series 3: Correspondence on Specific Subjects, 1881-1925, MS 4458, National Anthropological Archives, Suitland, Maryland. This document is cited in footnote No. 83 of Greenwald's report.

[74] Hiram Price to Alice Fletcher, May 7, 1883, Box 3, Series 3: correspondence on Specific subjects, 1881-1925, MS 4558, National Anthropological Archives, Suitland, Maryland. This document is cited in footnote No. 73 in Greenwald's report.

[75] Greenwald, "The Western Boundary of the Omaha Indian Reservation,." pp. 26-28.

[76] 2007 Boundary and Annexation Survey Map, Cuming and Thurston counties (173), U. S. Census Bureau, U. S. Dept. of Commerce, January 1, 2007; Index for 2007 Boundary and Annexation Survey Maps," Basentity-ID 23117300000, Thurston County (173), U.S. Census Bureau, U. S. Dept. of Commerce, 2007; 2008 Boundary and Annexation Survey (BAS): Pender Village, (38750), U. S. Census Bureau, U. S. Dept. of Commerce, February 12, 2008.;; Map of Pender township (38767), Omaha

Reservation (2550), U. S. Census Bureau, U. S. Dept. of Commerce, January 1, 2000.

[77] Robert LaMacchia to Teri Lamplot, May 8, 2007. A copy of this letter is available in the Omaha tribal archives. Bold type in quote inserted by author.

[78] Greenwald, "The Western Boundary of the Omaha Indian Reservation," p. 28.

[79] Memorandum by Patrice H. Kunesh, Deputy Solicitor for Indian Affairs to Patricia Wilfahrt, April 16, 2012. A copy of this letter is in the possession of the author.

[80] IBID.; Priscilla Wilfahrt to Alice Harwood, April 24, 2008, Field Solicitor's Office, Ft. Snelling, MN, BIA Regional Director's Office, Great Plains, BIA.GPRO.20080342. A copy of this letter is in the possession of the author. Bold type in quote inserted by author.

[81] Memorandum by Patrice H. Kunesh, April 16, 2012; Field Notes of the Boundary of the Omaha Indian Reservation, June 27, 1855, Land Division, Ancient and Miscellaneous Surveys, Number 15, Vol. 3, Records Group 75, National Archives.

[82] Jon Bruning, Milissa Johnson-Wiles, and Jody Fenner to Hobart Rupe, February 15, 2007, Omaha Tribal Archives. Bold type in quotes inserted by author.

[83] http://thurstoncountynebraska.us/webpages/history/history.html. Bold type in quote inserted by author.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

RICHARD SMITH, et al.,
Plaintiffs,
and
STATE OF NEBRASKA,
Plaintiff-Intervenor,
v.
MITCH PARKER, et al.,
Defendants,
and
THE UNITED STATES,
Defendant-Intervenor.

Case No. 4:07-CV-3101

INDEX OF EVIDENCE IN SUPPORT OF MOTION OF STATE OF NEBRASKA FOR LEAVE TO FILE ADDITIONAL EVIDENCE

(Filed Jul. 23, 2013)

COMES NOW the State of Nebraska and files this index of evidence in support of its motion for leave to file additional evidence.

1. Affidavit of Ryan S. Post.
2. Exhibit 2 – 1883 map showing Indian reservations within the limits of the United States, *available at* http://www.loc.gov/resource/g3701g.ct002649/
3. Exhibit 3 – 1888 map showing the location of the Indian reservations within the limits of the United States, *available at* http://www.loc.gov/resource/g3701g.ct002651/

4. Exhibit 4 – 1892 map showing Indian reservations within the limits of the United States, *available at* http://www.loc.gov/resource/g3701g.ct002305/

5. Exhibit 5 – 1886 map of Nebraska published by the Burlington Route, *available at* http://www.loc.gov/resource/g4191p.rr002490/

6. Exhibit 6 – 1889 Railway map of Nebraska issued by the State Board of Transportation, *available at* http://www.loc.gov/resource/g4191p.rr002500/

7 Exhibit 7 – 1908 Outline map of Cuming County from the Standard atlas of Cuming County, Nebraska, *available at* http://www.loc.gov/resource/g4193cm.gla00166/#seq-5

8. Exhibit 8 – 1908 map of Grant Township from the Standard atlas of Cuming County, Nebraska, *available at* http://www.loc.gov/resource/g4193cm.gla00166/#seq-15

9. Exhibit 9 – 1908 map of Bancroft Township from the Standard atlas of Cuming County, Nebraska, *available at* http://www.loc.gov/resource/g4193cm.gla00166/#seq-22

10. Exhibit 10 – E-mail correspondence between counsel for Defendants and counsel for Plaintiff Intervenor on July 18-22, 2013.

Dated this 23rd day of July, 2013.

STATE OF NEBRASKA, Plaintiff Intervenor.

By: JON BRUNING, NE #20351
Attorney General of Nebraska

By: *s/ Ryan S. Post*
Ryan S. Post, NE #24714
Assistant Attorney General

David D. Cookson, NE #18681
Chief Deputy Attorney General

Katherine J. Spohn, NE #22979
Deputy Attorney General

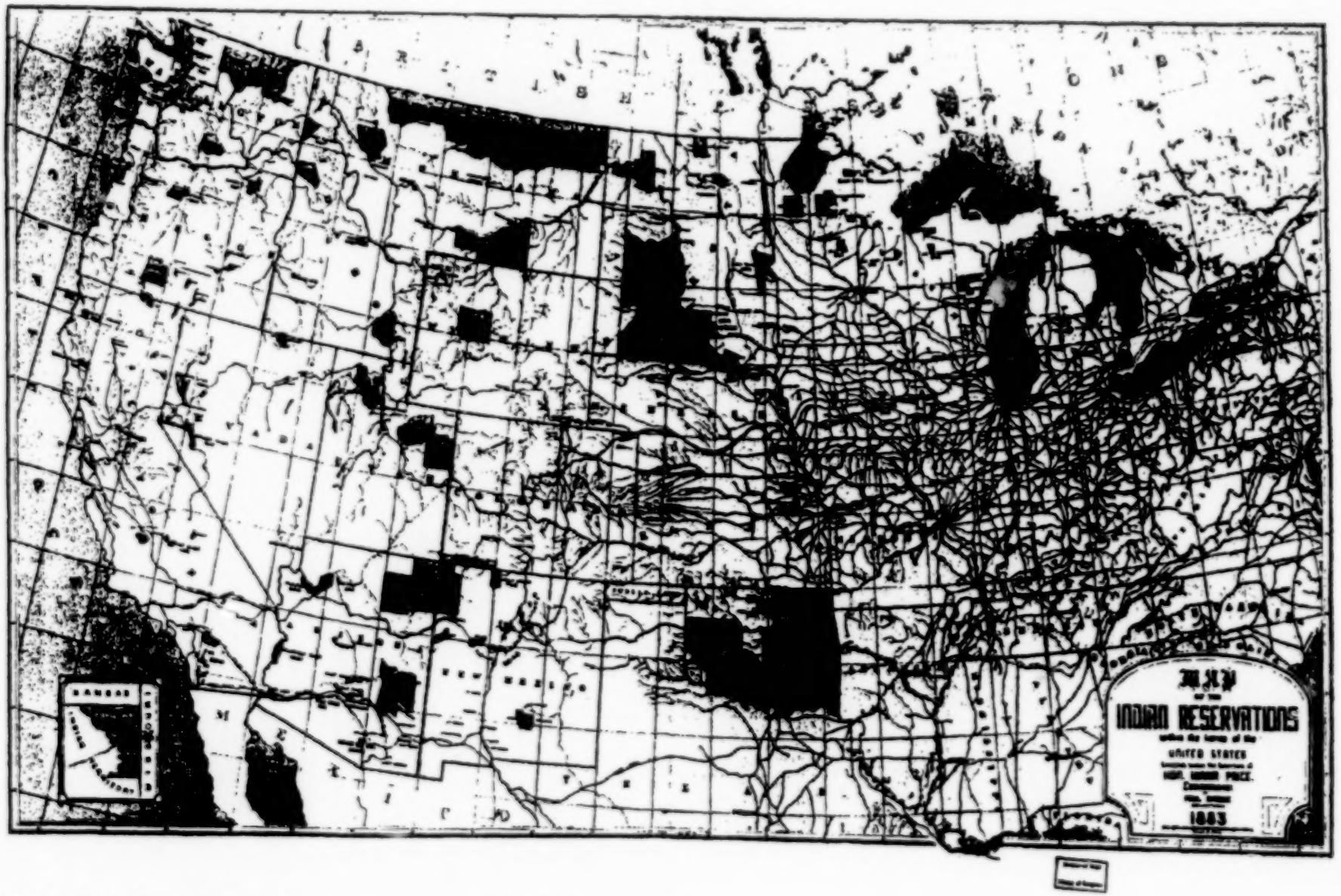
David A. Lopez, NE #24947
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
Ryan.Post@nebraska.gov
David.Cookson@nebraska.gov
Katie.Spohn@nebraska.gov
Dave.Lopez@nebraska.gov

Attorneys for Plaintiff Intervenor.

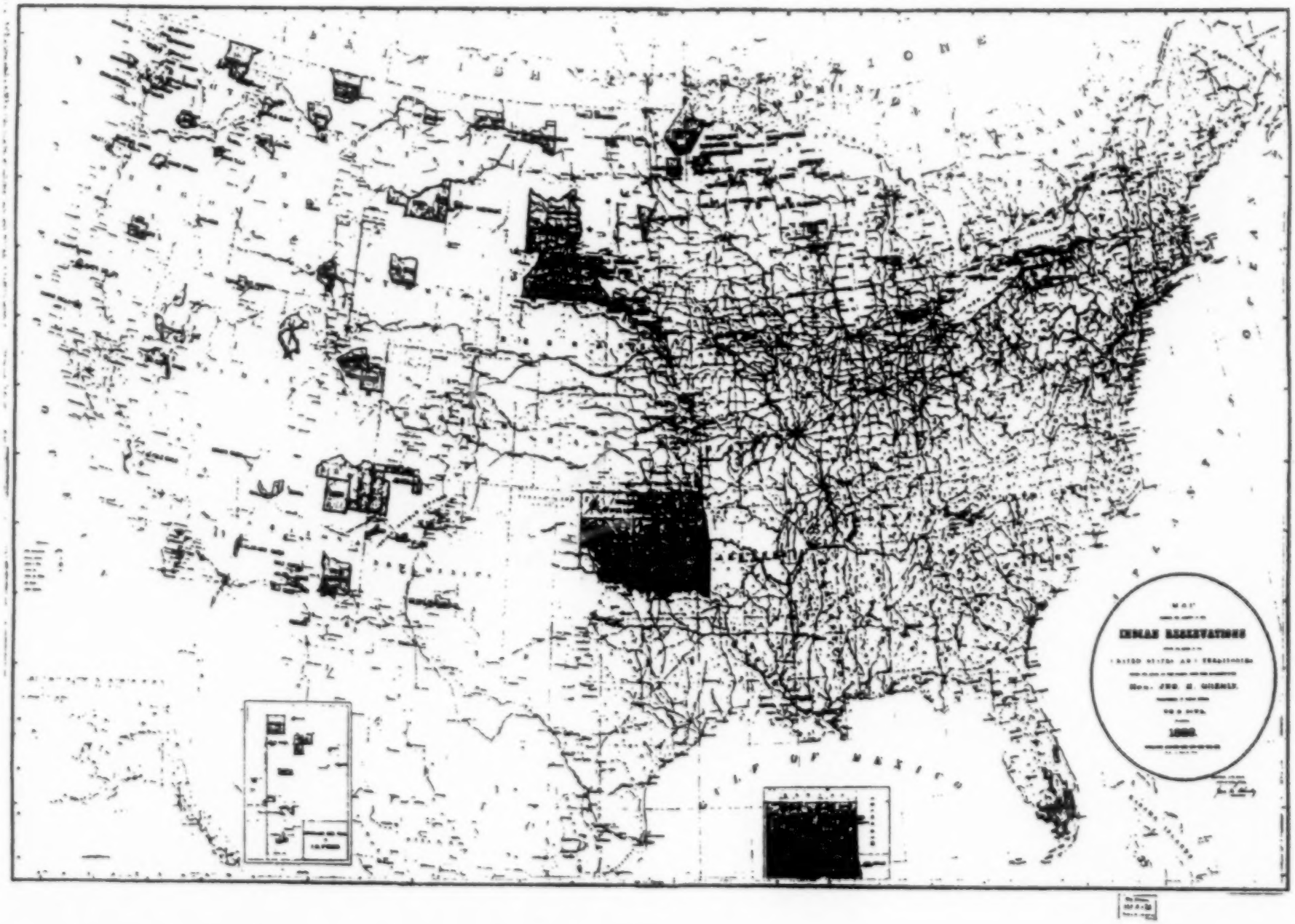
[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
(Filed Jul. 23, 2013)



[Available online at http://www.loc.gov/resource/g3701g.ct002649/]

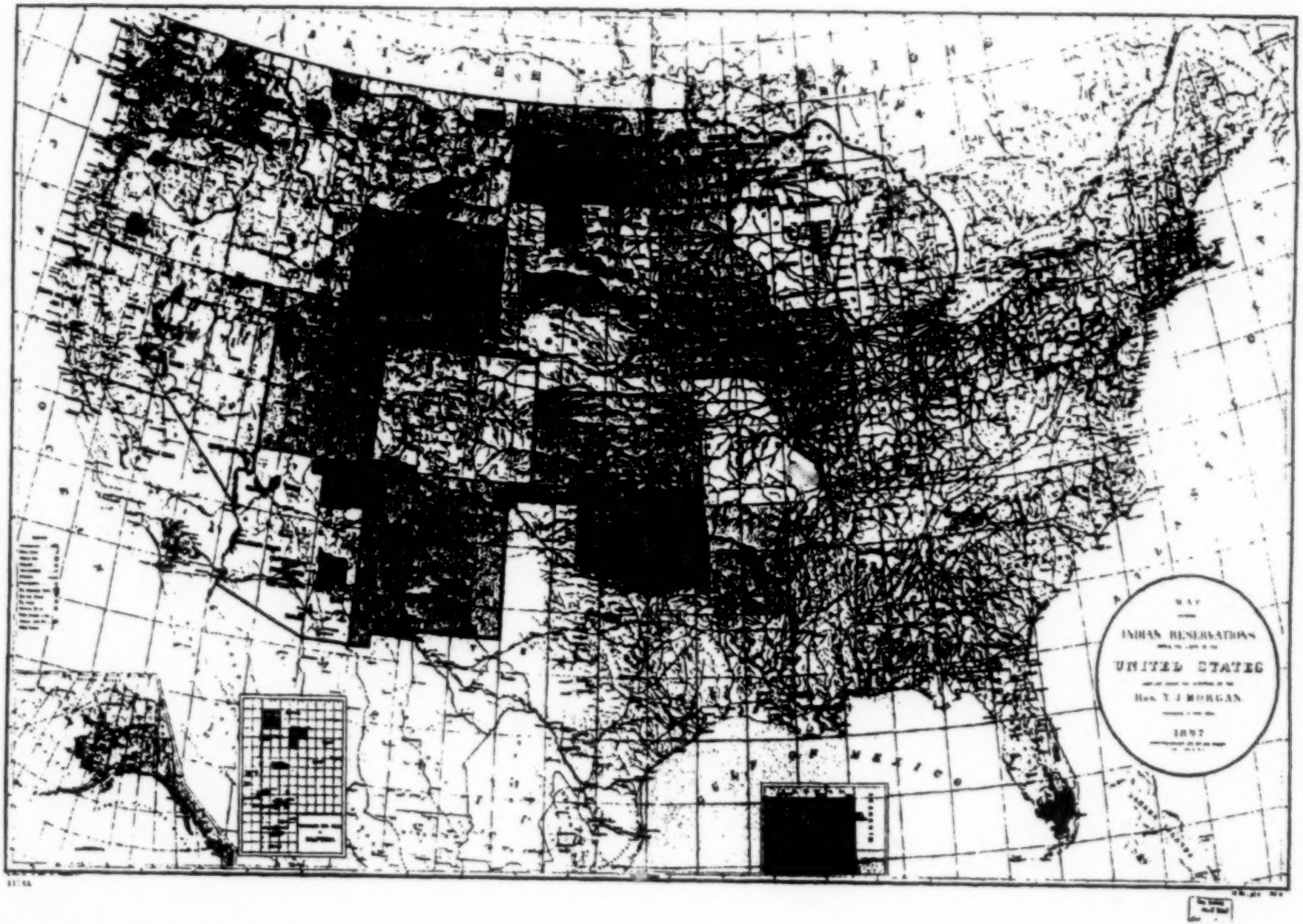
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
(Filed Jul. 23, 2013)



[Available online at http://www.loc.gov/resource/g3701g.ct002651/]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

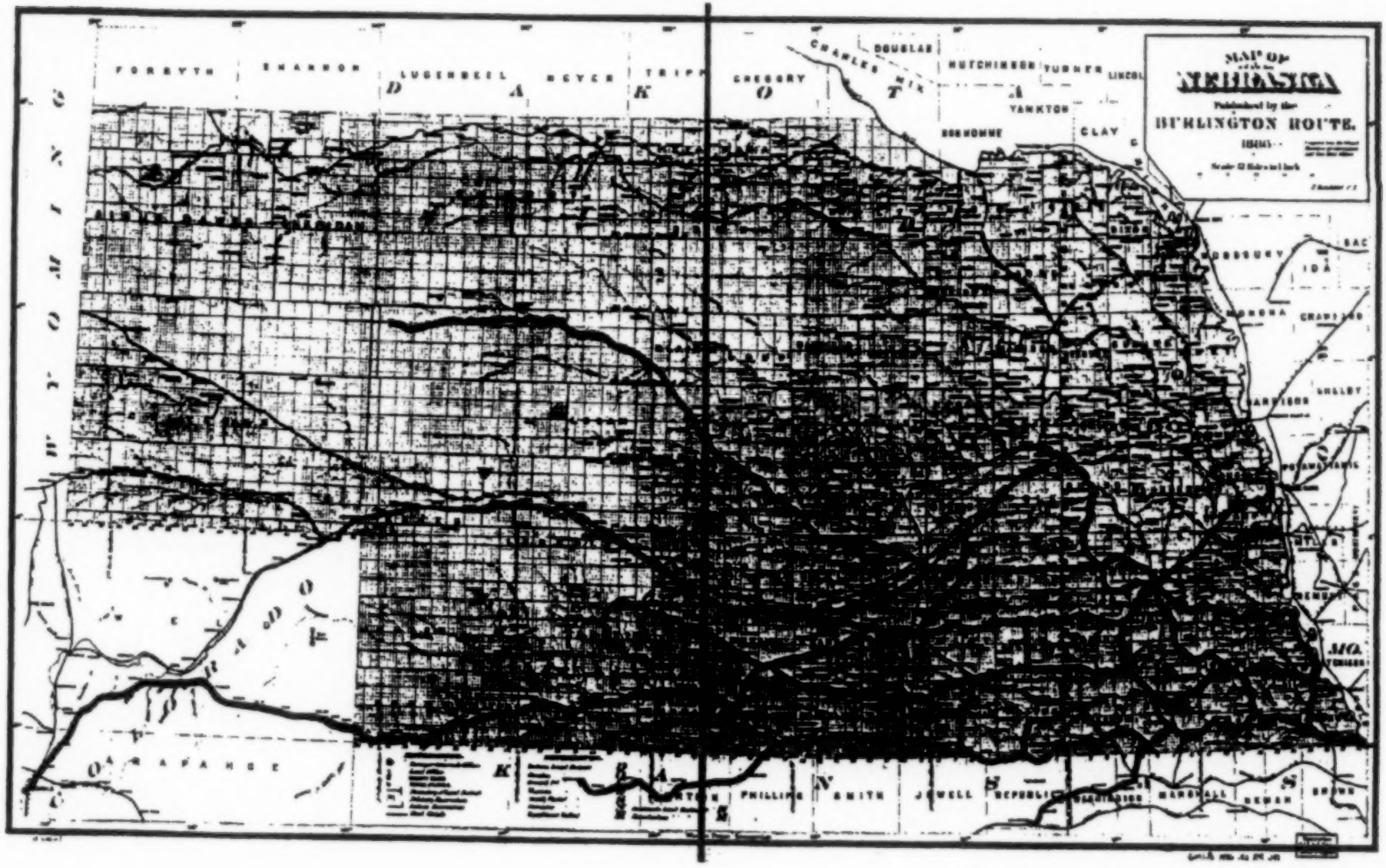
(Filed Jul. 23, 2013)



[Available online at http://www.loc.gov/resource/g3701g.ct002305/]

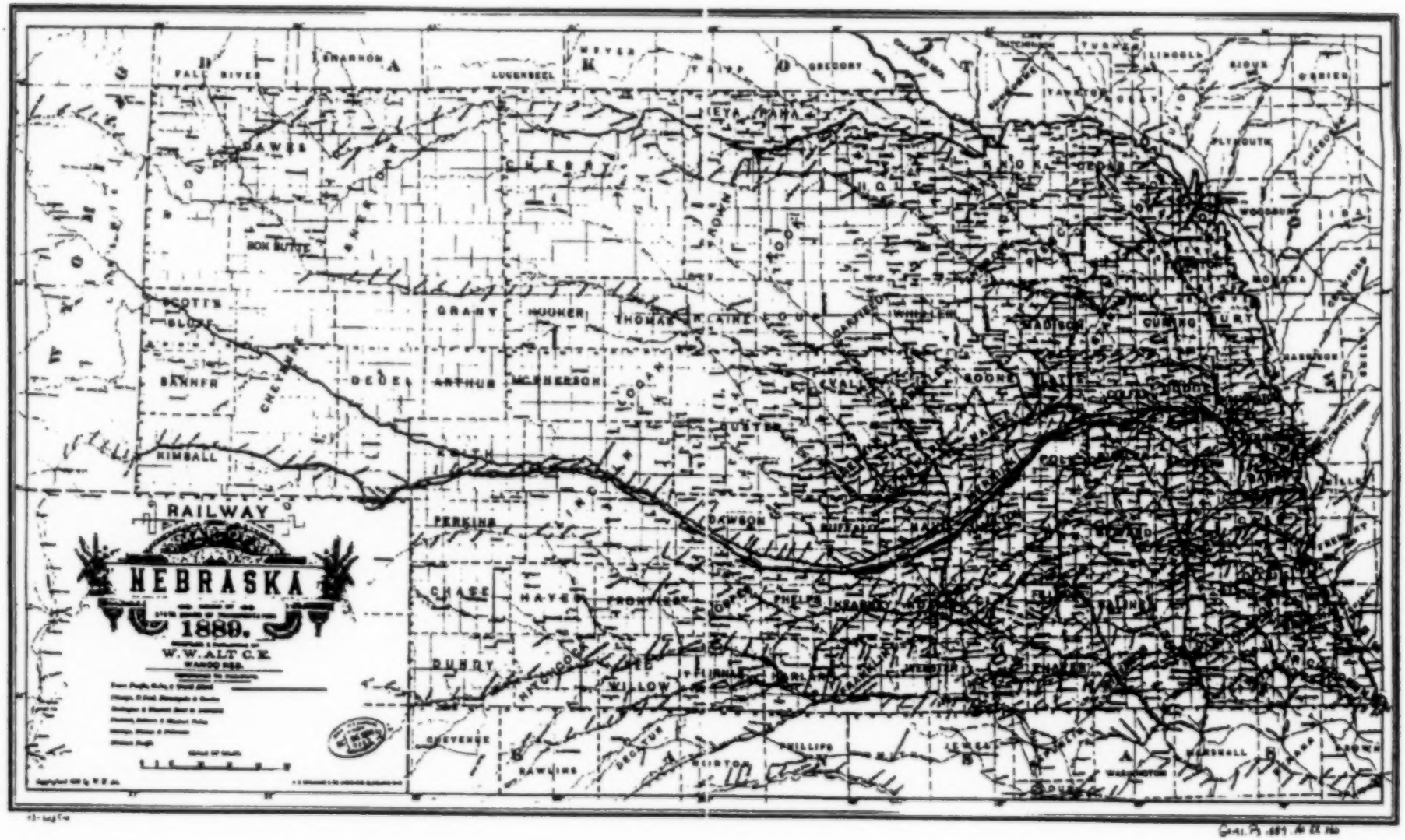
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

(Filed Jul. 23, 2013)

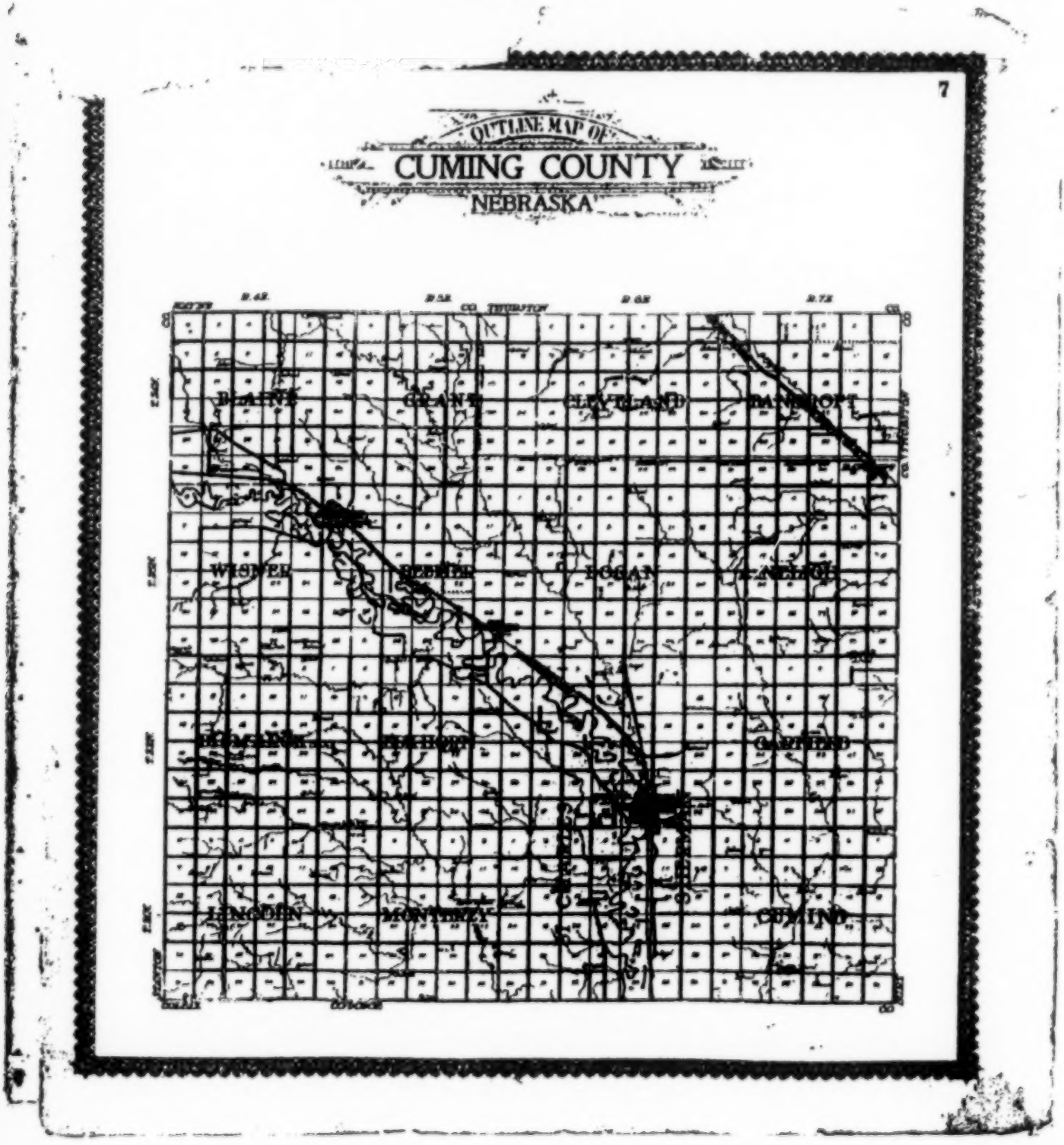


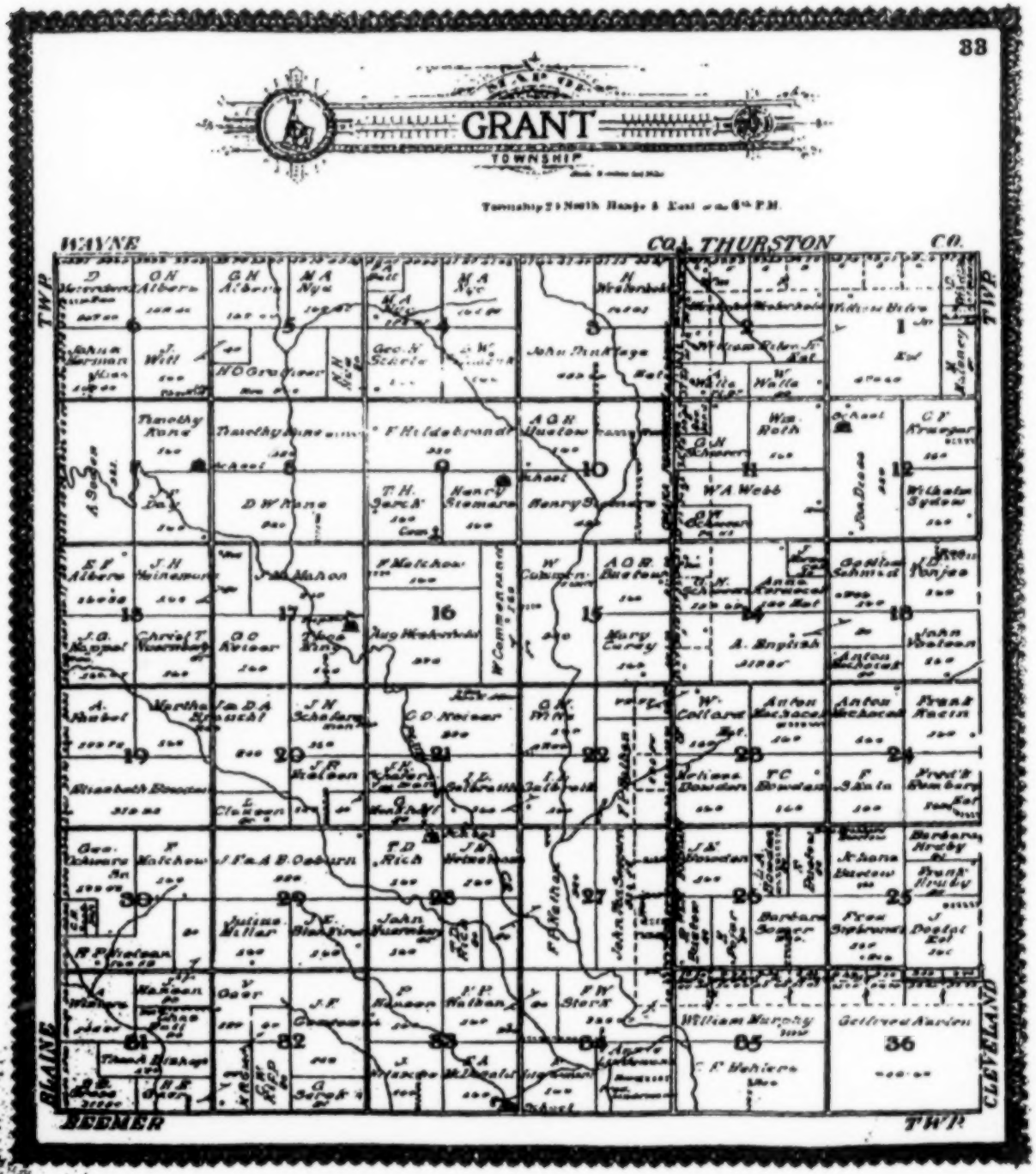
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

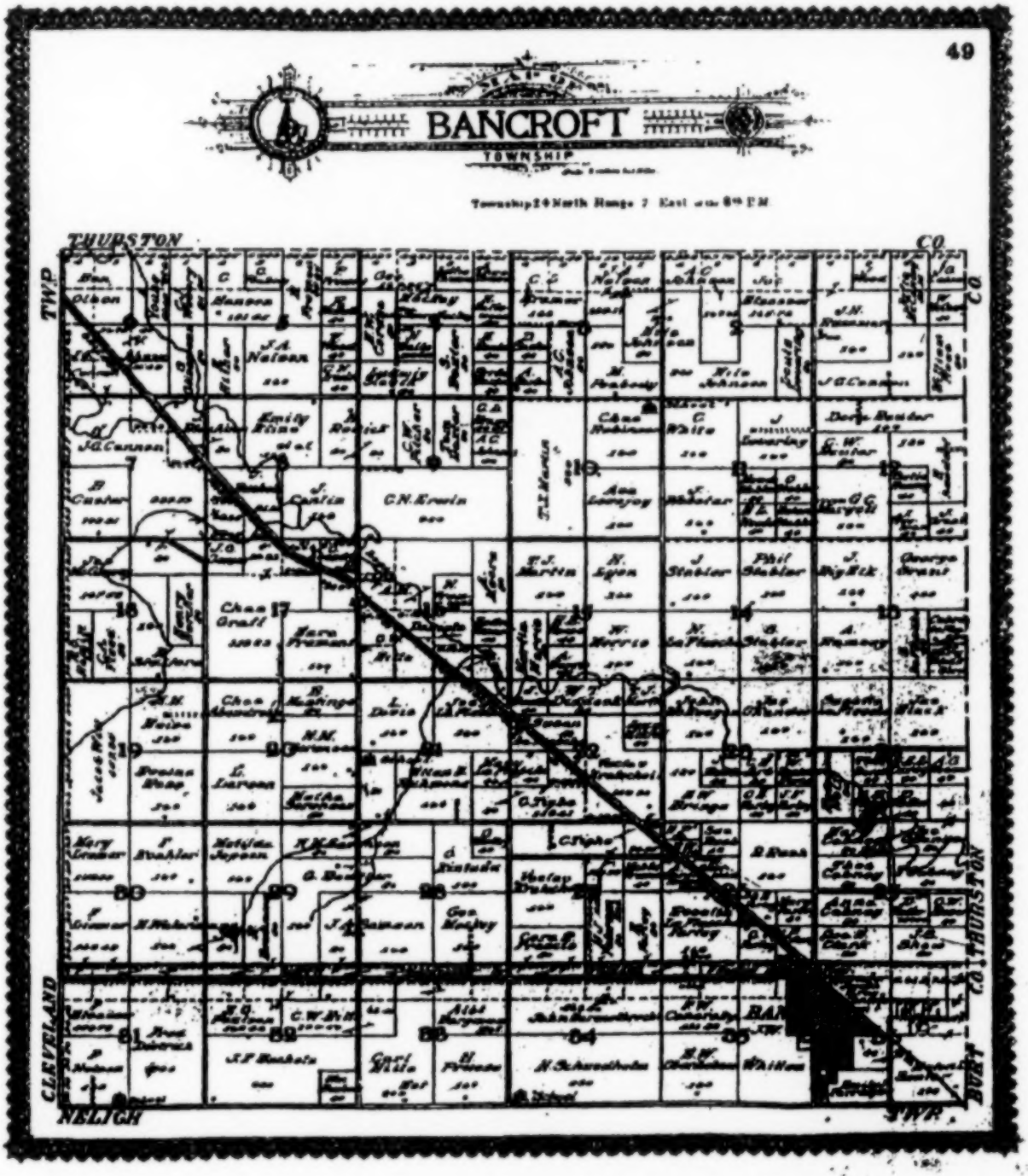
(Filed Jul. 23, 2013)



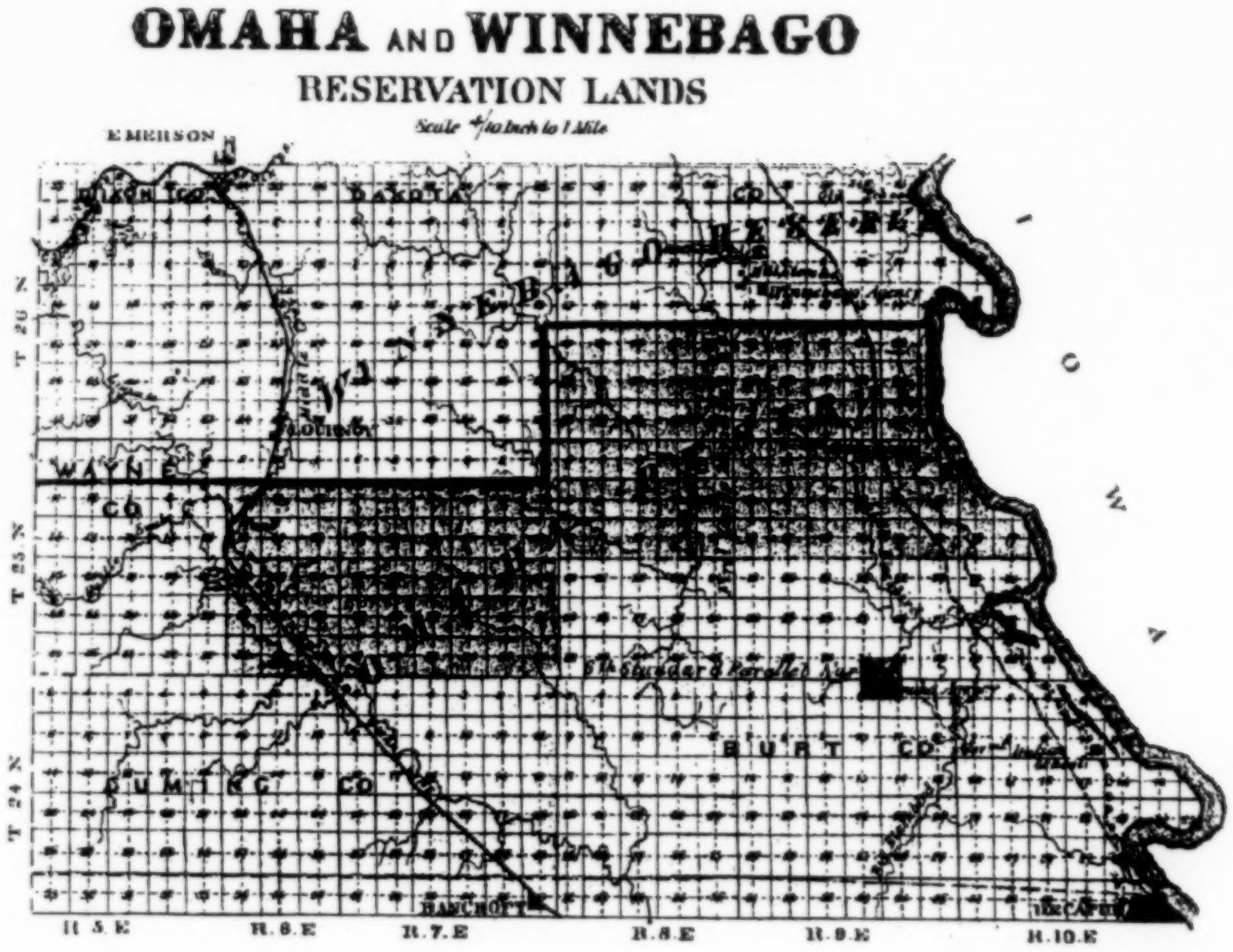
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
(Filed Jul. 23, 2013)




33
GRANT
TOWNSHIP
WAYNE CO.
THURSTON CO.
BLAINE TWP.
CLEVELAND TWP.
BEEMER


49
BANCROFT
TOWNSHIP
THURSTON
CO.
TWP.
CLEVELAND
NELIGH
BURT
CO. THURSTON
TWP.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
(Filed Jul. 23, 2013))



IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed Jul. 8, 2014)

[Printer's No., 7896.

47TH CONGRESS, 1ST SESSION,

S. 1255.

[Report No. 1530.]

IN THE HOUSE OF REPRESENTATIVES.

APRIL 27, 1882.

Ordered to be printed.

JULY 1, 1882.

Reported with an amendment, committed to the Committee of the Whole House on the state of the Union, and ordered to be printed.

Strike out all after the enacting clause and insert the part printed in *italics*.

AN ACT

To provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That with the consent of the Omaha tribe of Indians expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, a portion of their reservation, not to exceed fifty thousand acres,~~

to be taken from the western part thereof, and to be separated from the remaining portion of said reservation by a line running along the section lines from north to south. The said lands so separated shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to offer the same for sale, for cash, to the highest bidder, through the United States public land office at Neligh, Nebraska, under such instructions as the Secretary of the Interior may issue, till the whole of said lands are sold, in tracts not to exceed one hundred and sixty acres, to persons who shall make oath before the register or the receiver of said land office that they intend to occupy the land for which they bid, and that they will, within three months from the date of such bid, make a permanent improvement upon the same: Provided, That if, in judgment of the Secretary of the Interior, it shall be more advantageous to sell said lands upon deferred payments, he may, with the consent of the Indians expressed in open council, dispose of the same upon the following terms as to payments, that is to say: One fourth of the price of said land to become due and payable at the expiration of three months from the date of the bid, one fourth in one year, one fourth in two years, and one fourth in three years from said date, with interest at the rate of five

per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of thirty days shall forfeit absolutely his right to the tract for which he bid and any payment or payments he might have made: And provided further, That whenever any person shall bid, under the provisions of this act, for a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in the survey to make township and section lines conform to the boundary lines of the reservation, his bid shall not be rejected on account of such excess, but purchase shall be allowed as in other cases: And provided further, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre: Provided further, That not more than one hundred and sixty acres of said land shall be sold to any one person.

SEC 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to

~~payment, improvement, and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and pre-emption acts: Provided, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.~~

~~SEC. 5. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of eight dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.~~

~~SEC. 6. That in addition to the purchase money, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and the register of the land office at Neligh, Nebraska, as their fees for services rendered.~~

That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty

acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is, authorized to issue proclamation to the effect that all unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at-law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash, through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act: Provided, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have

made: And provided further, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: And provided further, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre: And provided further, That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land-office at Neligh,

Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and pre-emption acts: Provided, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: Provided, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to

receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: Provided further, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and

allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that

said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: And provided further, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

No. 14-1406

In The
Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONERS

DOUGLAS J. PETERSON
Attorney General of Nebraska

JAMES D. SMITH
Solicitor General
of Nebraska
Counsel of Record

RYAN S. POST
DAVID A. LOPEZ
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov

Attorneys for the State of Nebraska

GENE SUMMERLIN
MARNIE A. JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, NE 68508-2967
(402) 434-8040
gene.summerlin@
huschblackwell.com
marnie.jensen@
huschblackwell.com
mark.hill@
huschblackwell.com

Attorneys for Individual & Village Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In *Solem v. Bartlett*, this Court articulated a three-part analysis designed to evaluate whether a surplus land act diminished a federal Indian reservation. See 465 U.S. 463, 470-72 (1984). The Court found that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred. *Id.* Later, in *Hagen v. Utah*, this Court explained that the diminishment inquiry requires courts "examine all circumstances surrounding the opening of a reservation." 510 U.S. 399, 412 (1994). This Court has also reiterated after *Solem* that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, . . . *de facto*, if not *de jure*, diminishment may have occurred." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 356 (1998).

The questions presented for review are:

1. Whether ambiguous evidence concerning the first two *Solem* factors forecloses any possibility that diminishment could be found on a *de facto* basis.

2. Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882.

PARTIES TO THE PROCEEDING

Petitioners are Richard M. Smith, Donna M. Smith, Doug Schrieber, Susan Schrieber, Rodney A. Heise, Thomas J. Welsh, Jay Lake, Julie Lake, Kevin Brehmer, and Ron Brinkman ("Individual Petitioners"); the Village of Pender, Nebraska ("Village Petitioner"); and the State of Nebraska (collectively "Petitioners"). The State of Nebraska was Plaintiff-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellant to the Eighth Circuit Court of Appeals.

Respondents are Mitch Parker in his official capacity as Chairman of the Omaha Tribal Council; Barry Webster in his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan in his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris in his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou in his official capacity as member of the Omaha Tribal Council; Eleanor Baxter in her official capacity as member of the Omaha Tribal Council; Ansley Griffin in his official capacity as member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control (the "Individual Respondents"); and the United States (collectively, "Respondents"). The United States was Defendant-Intervenor in proceedings before the United States District Court for the District of Nebraska and Appellee to the Eighth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
I. The Original Boundaries Of The Tribe's Reservation	2
II. Sale Of The Western Part Of The Reservation	3
III. Settlement Of The Western Part Of The Reservation	8
IV. United States' Treatment Of The Disputed Area	11
V. Nebraska's Longstanding Jurisdiction Over The Disputed Area	15
VI. Treatment Of The Disputed Area By The Tribe	17
VII. Enforcement Of The Ordinance And Subsequent Litigation	18
SUMMARY OF THE ARGUMENT	20
ARGUMENT	24

TABLE OF CONTENTS – Continued

Page

I. NEBRASKA'S UNCHALLENGED HISTORY OF JURISDICTION OVER THE DISPUTED AREA SHOWS DIMINISHMENT 24

A. Disputed Area Has No History Of Indian Character 26

B. Less Than 2% Of The Total Acreage Of The Disputed Area Was Allotted To Tribal Members 29

C. Nebraska's History Of Jurisdiction Over The Disputed Area 31

D. All Governmental Services In The Disputed Area Are Provided By State And Local Agencies 33

E. United States History Of Treating The Disputed Area As Diminished 34

II. THE CONTEXT SURROUNDING THE 1882 ACT SHOWS CONGRESS INTENDED TO ALTER THE RESERVATION'S BOUNDARIES 38

A. Prior To The 1882 Act, Congress Repeatedly Attempted To Separate And Sell The Disputed Area 39

B. The Legislative History Of The 1882 Act Demonstrates The Understanding The Reservation Would Shrink As A Result Of The Legislation 41

TABLE OF CONTENTS – Continued

Page

C. The 1872 And 1882 Acts Predate The Dawes Act And Are Unlike General Allotment Acts 43

III. THE 1882 ACT SUPPORTS DIMINISHMENT 46

A. An Explicit Reference To Cession Is Not A Prerequisite For A Finding Of Diminishment 46

B. The Tribe's Lack Of Residence On The Disputed Area Explains The Lack Of Cession Language 49

IV. THE PUBLIC'S JUSTIFIABLE EXPECTATIONS WILL BE UPSET BY EXPANDING THE JURISDICTION OF THE TRIBE OVER 130 YEARS AFTER DIMINISHMENT 51

CONCLUSION 53

TABLE OF AUTHORITIES

Page

CASES

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) 22, 25, 30

DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425 (1975) 22, 28, 30, 44

Hagen v. Utah, 510 U.S. 399 (1994).....*passim*

Mattz v. Arnett, 412 U.S. 481 (1973).....44, 50

Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010) 37, 48

Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 46

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....*passim*

Seymour v. Supt. of Wash. State Pen., 368 U.S. 351 (1962).....44

Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014).....1

Smith v. Parker, 774 F.3d 1166 (8th Cir. 2014).....1

Smith v. Parker, 2015 U.S. App. LEXIS 3054 (8th Cir. 2015) 1

Solem v. Bartlett, 465 U.S. 463 (1984).....*passim*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).....*passim*

Wisconsin v. Stockridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 43, 44, 46, 47, 48

TABLE OF AUTHORITIES – Continued

Page

TREATIES AND STATUTES

18 U.S.C. § 1162 ..... 17, 32

28 U.S.C. § 1331 18

28 U.S.C. § 1360 ..... 17, 32

Treaty of Mar. 16, 1854, U.S.-Omaha Tribe, 10 Stat. 1043 ..... 2, 3, 50, 51

Treaty of Mar. 6, 1865, U.S.-Omaha Tribe, 14 Stat. 667 ..... 3, 50, 51

Act of June 10, 1872, ch. 436, 17 Stat. 391 ..... *passim*

Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 ..... *passim*

Dawes Act, 24 Stat. 388 ..... 43, 44

MISCELLANEOUS

35 Fed. Reg. 16598 (1970) 17, 32

71 Fed. Reg. 10,056 (Feb. 28, 2006) 18

Neb. Revenue Ruling 99-05-01 (Sept. 29, 2005) 17

OPINIONS BELOW

The Omaha Tribal Court's order finding the Omaha Indian Reservation was not diminished is reproduced at J.A. 77. The district court's order finding the Omaha Indian Reservation was not diminished is available at 996 F. Supp. 2d 815 and reproduced at Pet. App. 9. The Eighth Circuit's order affirming the district court's order is available at 774 F.3d 1166 and reproduced at Pet. App. 1. The Eighth Circuit's decision denying rehearing en banc is available at 2015 U.S. App. LEXIS 3054 and reproduced at Pet. App. 80.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). On December 19, 2014, the Eighth Circuit affirmed the district court's order. On February 26, 2015, the Eighth Circuit denied rehearing en banc. Petitioners filed their petition for writ of certiorari on May 27, 2015, and this Court granted the petition on October 1, 2015.

STATUTES INVOLVED

The Act of June 10, 1872, is available at 17 Stat. 391 and reproduced at J.A. 631. The Act of August 7, 1882, is available at 22 Stat. 341 and reproduced at J.A. 227.

STATEMENT OF THE CASE

From 1882 until 2006, the State of Nebraska consistently, and exclusively, exercised civil and criminal jurisdiction over Pender, Nebraska and its surrounding areas[1] (hereinafter the "disputed area") without contest or objection from the Omaha Tribe of Nebraska (hereinafter "Omaha" or "Tribe") or the United States. J.A. 215-16, 369-72, 609. Since the early twentieth century, non-Indians have comprised over 98% of the disputed area's population and the United States conveyed over 98% of the land in the disputed area to non-Indians. J.A. 204, 206, 208, 364-68. The non-Indian residents of the disputed area have never been subjected to the jurisdiction of the Tribe and have developed justifiable expectations accordingly.

Before addressing the legal arguments, it is necessary to examine the relevant history of the boundaries at issue in this case.

I. The Original Boundaries Of The Tribe's Reservation.

Under the Treaty of March 16, 1854 ("1854 Treaty"), the Omaha ceded to the United States "all

---

[1] Specifically, this includes all 50,157 acres of Thurston County, Nebraska, lying west of the now-abandoned right-of-way of the Sioux City and Nebraska Railroad. This includes the Village of Pender itself and the surrounding region west of the railroad right-of-way.

their lands west of the Missouri River, and south of a line drawn due west from a point in the centre of the main channel. . . ." J.A. 191, 1020. Under the 1854 Treaty, the original boundaries of the Omaha Reservation were set and the original size of the Omaha Reservation was approximately 300,000 acres. J.A. 192, 1021.

On March 6, 1865, the Omaha entered into another treaty ("1865 Treaty") whereby the Omaha ceded the northern part of the reservation to the federal government for fifty-thousand dollars ($50,000.00), which monies were to be expended for the Tribe's benefit, creating the Winnebago Reservation. J.A. 192, 1014-18. The 1865 Treaty reduced the size of the reservation to approximately 202,000 acres and ordered the allotment of the land to individual members of the Tribe. J.A. 192, 1014-18. By March of 1871, tribal members had received certificates for their allotments and all allotments taken under the 1865 Treaty were in the eastern, or non-disputed area, of the reservation. J.A. 193. In 1874, an additional 12,374 acres were sold to the Wisconsin Winnebagoes. J.A. 196.

II. Sale Of The Western Part Of The Reservation.

In August 1871, the Omaha, through their designated federal agent, began petitioning Congress to enact legislation authorizing the sale of the 50,000 acres comprising the western-most portion of the

reservation. J.A. 194, 419, 424. On January 22, 1872, Commissioner of Indian Affairs F.A. Walker recommended the requested legislation to Congress and stated: "I believe that the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194, 625. Congress responded by enacting the Act of June 10, 1872 ("1872 Act"), providing for the sale of up to 50,000 acres "to be taken from the western part" of the reservation and "to be separated from the remaining portion of said reservation." J.A. 631. However, apparently due in part to the availability and pricing of other land, the 1872 Act only resulted in the sale of approximately 300 acres. J.A. 333-35. In 1874, the Commissioner of Indian Affairs reported that the reservation contained 192,867 acres, but he continued: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 360-61, 504.

In 1880, Congress considered legislation, as explained by Senator Alvin Saunders of Nebraska, to facilitate the sale of the western 50,000 acres of the reservation not sold under the 1872 Act. J.A. 196. The 1880 proposal did not advance. J.A. 197. Critically, however, on April 19, 1880, the Tribe granted the Sioux City and Nebraska Railroad Company a right-of-way through the reservation ("railroad right-of-way"), beginning at the northern edge and generally running southward along the Middle and Logan creeks. J.A. 336. The Tribe's decision to bring the

advent of the railroad to the reservation was a critical event for the subsequent diminishment of the reservation.

Two years after the Tribe granted the railroad right-of-way to the railroad company, Congress enacted the Act of August 7, 1882 ("1882 Act") which provided for the sale of "all that portion of [the Reservation] lying west of the right of way. . . ." J.A. 227-33. The railroad right-of-way now provided a clear demarcation of the boundary-line west of which all land would ultimately be sold (and a means, previously lacking, by which settlers and goods could readily transit to and from the region). As explained by Senator Saunders: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed (J.A. 582, 644), ... Twice they have expressed themselves already in open council in favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold." J.A. 469.

According to the local Indian Agent's report submitted to the Senate Committee considering the bill, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 583, 657. Therefore, Senator Ingalls, a member of the committee, explained that under the bill "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely

relinquished." J.A. 647. The 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." J.A. 647. Senator Henry Dawes further explained: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation." J.A. 683.

On July 1, 1882, the House Committee offered a substitute bill that authorized both the sale of land on the western portion and allotment in severalty to Tribe members. J.A. 199, 339. During debate, Representative Edward Valentine of Nebraska assured his fellow legislators:

> You cannot find one of those Indians that does not want the western portion sold, not the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They

> will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

J.A. 201, 726. When discussing the provision to allow Tribe members to select allotments west of the railroad right-of-way, Representative Valentine explained that "[t]hey do not care about making selections over on that side of the road at all." J.A. 739. On July 27, 1882, the House approved S. 1255 as amended to provide for both the grant of allotments to Tribe members from either the east or west portions of the Omaha Reservation, as well as the sale of the remaining portion of the reservation west of the railroad right-of-way to white settlers. J.A. 202, 340.

Although initially referred back to committee by the Senate, the Senate withdrew its opposition to the House amendment to S. 1255. J.A. 202, 340-41. On August 7, 1882, President Chester Arthur signed the bill into law. J.A. 202, 340-41.

Local Omaha and Winnebago Agent George Wilkinson subsequently reported that the Tribe consented to the Act on May 5, 1883. J.A. 345.

The 1882 Act directed a survey and appraisal before the lands west of the railroad right-of-way could be opened for settlement and sale. J.A. 227. The allotment provisions of the 1882 Act also needed to be carried out before any sale could be effected. J.A. 203-04, 207. Alice Fletcher, who was appointed by the Secretary of the Interior as a special agent to oversee

the allotment process, urged the Omahas to select land near the railroad right-of-way. J.A. 203-04, 347-48, 598. Few Omahas accepted Fletcher's advice; most preferred the eastern part of the reservation for its access to water and timber. J.A. 203-04, 347-48, 598. When the allotment process under the 1882 Act concluded, only 876 of the approximately 50,000 acres west of the railroad right-of-way (comprised of 10-15 allotments) had been allotted to members of the Tribe. J.A. 204, 347, 480. "No Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99. All told, Indian allotments either wholly or partially west of the railroad right-of-way represented less than 2% of the total acreage west of the railroad right-of-way. J.A. 366-67. On April 30, 1884, the General Land Office opened 50,157 acres west of the railroad right-of-way for settlement by non-Indians. J.A. 204-05, 350.

III. Settlement Of The Western Part Of The Reservation.

According to the Secretary of the Interior's 1884 report, when the area west of the railroad right-of-way opened for settlement, "the major portion thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." J.A. 357. Local Indian Agent Wilkinson confirmed the disputed area was "immediately occupied" by settlers. J.A. 486.

One settler, W.E. Peebles, left the town of Oakland, Nebraska, purchased a 160-tract of land near

the railroad right-of-way and platted a townsite to found the Village of Pender. J.A. 208, 357. Lots within the townsite were sold on April 7, 1885. J.A. 208, 357. Soon, Pender became the county seat of Thurston County, Nebraska. J.A. 357-58. Between 1885 and 1889, Pender grew to a population of more than 300. J.A. 357. Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the railroad right-of-way has ranged from 98.18% to 99.95%. J.A. 208, 366.

The following chart shows the U.S. Census Bureau data for the Indian and non-Indian populations in the disputed area west of the railroad right-of-way compared to the eastern part of the reservation.

Census Year		Total	Non-Indian	Non-Indian%	Indian	Indian%
1900	Thurston – East of ROW	2361	1404	59.47%	957	40.53%
	Thurston & Cuming West of ROW	4374	4362	99.73%	12	0.27%
1910	Thurston – East of ROW	3778	2838	75.12%	940	24.88%
	Thurston & Cuming West of ROW	3957	3885	98.18%	72	1.82%
1920	Thurston – East of ROW	4399	3748	85.20%	651	14.80%
	Thurston & Cuming West of ROW	3846	3844	99.95%	2	0.05%
1930	Thurston – East of ROW	4841	3822	78.95%	1019	21.05%
	Thurston & Cuming West of ROW	4188	4153	99.16%	35	0.84%
1990	Thurston – East of ROW	3248	1365	42.03%	1883	57.97%
	Thurston & Cuming West of ROW	2624	2613	99.58%	11	0.42%
2000	Thurston – East of ROW	3349	1012	30.22%	2337	69.78%
	Thurston & Cuming West of ROW	2519	2498	99.17%	21	0.83%

IV. United States' Treatment Of The Disputed Area.

After enactment of the 1882 Act, the United States consistently treated the 50,000+ acres opened for settlement west of the railroad right-of-way as no longer being part of the reservation. In 1884, Indian Agent Wilkinson described the settlers as "surrounding the[ ] reservation[ ]." J.A. 490. By 1885, the Commissioner of Indian Affairs reported that all lands lying west of the railroad right-of-way had been sold to non-Indian settlers. J.A. 500. In the Commissioner's opinion, the Winnebagoes would realize a great benefit from legislation "substantially similar" to the "Omahas (act of August 7, 1882)." J.A. 503. Like the Omahas, the Winnebagoes:

> [W]ould then have the benefit and be subject to the laws, both civil and criminal, of the State (Nebraska), and have individual title to their lands. As in the case of the Omahas, the unallotted lands remaining within the diminished reserve could be patented to the tribe in common.

J.A. 503. Consistent with the Commissioner of Indian Affairs' report, in 1885, local Agent Wilkinson described the results of the 1882 Act as follows: "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad, to actual settlers, and have taken allotments on the remainder." J.A. 350, 496, 1076.

In 1890, Indian Agent Robert Ashley reported that the Winnebago and Omaha reservations collectively "embrace[] the entire county of Thurston, Nebr., except a portion of the reservation which has been sold and is now occupied by the white purchasers." J.A. 606, 798. Agent Ashley made a similar statement in 1892. J.A. 817. Then, in 1901, Indian Agent Charles Mathewson reported: "The Chicago, St. Paul, Minneapolis and Omaha Railway passes through the Winnebago Reservation on the west and form the southwestern boundary of the Omaha Reservation." J.A. 841. In 1904, the superintendent in charge of the Omaha Agency reported: "This agency is located on the east side of the Omaha Reservation about 3 miles from the Missouri River, which forms the eastern boundary, and 20 miles from the western boundary line, which is marked by a section of the Northwestern Railway line extending between Omaha and Sioux City." J.A. 607; see also J.A. 1076.

The Office of Indian Affairs ("OIA") did not include the land west of the railroad right-of-way as part of the reservation in its reports of 1884, 1888, 1898, 1900, 1906, 1909, or 1911. J.A. 206-07, 517, 522, 525, 531, 536, 615. In each of these reports, the 1882 Act was specifically identified as a basis for concluding the area west of the railroad right-of-way was not within the total acreage of the reservation. J.A. 206-07, 517, 522, 525, 531, 536, 615. Similarly, the Winnebago Agency Annual Statistical Report for 1935 provides the total area of the original reservation was reduced by 162,504.53 acres in light of three

events, listing the sale of 50,157.00 acres of land west of the railroad right-of-way as one of such events. J.A. 208, 541.

A series of maps of the Omaha Reservation, compiled under the direction of the Commissioner of Indian Affairs, also show federal authorities believed the 1882 Act diminished the reservation. J.A. 1298-1300. In 1883, a map of Indian reservations, compiled under the direction of Hiram Price, Commissioner of Indian Affairs, revealed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1298, *available at* http://www.loc.gov/resource/g3701g.ct002649/. In 1888, a new map of Indian reservations "compiled from official and authentic sources, under the direction of the Hon. JNO. H. Oberly, Commissioner of Indian Affairs," showed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1299, *available at* http://www.loc.gov/resource/g3701g.ct002651/. Similarly, an 1892 map of Indian reservations "compiled under the direction of Hon. T.J. Morgan, Commissioner of Indian Affairs," showed that the boundaries of the Omaha Reservation did not extend west of the railroad right-of-way. J.A. 1300, *available at* http://www.loc.gov/resource/g3701g.ct002305/.

Additionally, Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settler's land payment schedules on multiple occasions. J.A. 205, 352. The 1888 extension directed the Secretary of the Interior to declare certain purchasers' tracts forfeited due to default on payment. J.A. 206, 352. Upon forfeiture, a settler's

tract did not revert back to the Tribe but instead was to be sold at public auction. J.A. 206, 360.

Section 8 of the 1882 Act provided that any "residue" lands lying east of the railroad right-of-way were to be patented to the Tribe in common and held in trust by the federal government. J.A. 232. In contrast, the 1882 Act contained no such provision for the land west of the railroad right-of-way. Furthermore, by 1919, all lands allotted to Tribal members west of the railroad right-of-way had been patented in fee simple. Thus, no trust land remained west of the railroad right-of-way demarcation line. J.A. 360.

An October 10, 1964, Bureau of Indian Affairs "Base Map" of the Omaha Indian Reservation contains a note reading:

> The land lying to the West of the line between Township 24 North, Range 7 East, and Township 24 North, Range 6 East, and West of the Sioux City and Nebraska Railroad Right-of-way (now C St. P. M & O RR) as it passed through Township 25 North, Range 6 East was "Opened for Settlement" by the Act of August 7, 1882, 22 Stat. 341. **This Office holds the opinion that the Act of Congress has DIMINISHED the borders of the Omaha Reservation.**

J.A. 562-64 (emphasis added).

In 1989, when asked by the Bureau of Indian Affairs to locate the western boundary of the Omaha Indian Reservation and after conducting an extensive historical and statutory review, the Office of the

Solicitor of the United States Department of the Interior confirmed "the most logical demarcation line for the western boundary of the Omaha Reservation is the centerline of the abandoned [Sioux City and Nebraska Railroad Company] right of way. . . . [U]nder the 1882 Act the land to the west of the right of way went out of Indian control when it was opened for settlement." J.A. 213-14, 369-70.

In 2012, only after the Individual Petitioners initiated the underlying action in federal court, the 1989 Department of Interior's opinion was officially withdrawn in response to a post-litigation letter from the Twin Cities Field Solicitor. J.A. 214, 281. This official change in the United States' views on jurisdiction over the disputed area occurred approximately 130 years after the 1882 Act.

V. Nebraska's Longstanding Jurisdiction Over The Disputed Area.

The State of Nebraska exercised jurisdiction over Pender without contest or objection from either the Omaha or the United States for nearly 125 years, from 1882 until 2006. West of the railroad right-of-way, all governmental services are provided by State and local agencies, not by the Tribe. J.A. 215-16, 319.

A significant example of the State's unquestioned authority occurred in a 1999 criminal case, when the United States voluntarily relinquished authority to Nebraska over a major crime committed by an Indian within the disputed area. In 1999, Winnebago

tribal member Damon Picotte of Macy shot and killed a non-Indian in the non-Indian's Pender home. J.A. 145. Picotte was originally apprehended by Omaha Tribal police and held by federal officers, but was voluntarily relinquished and transferred to state custody to be tried in state court. J.A. 145-52. When Picotte argued that the State lacked jurisdiction because the crime occurred on the reservation, the State district court for Thurston County rejected this defense and determined that the land west of the railroad right-of-way was not a part of the Omaha reservation. J.A. 145-52. Ultimately, Picotte was convicted of Second Degree Murder and is currently incarcerated in a Nebraska State prison. *Order on State v. Picotte*, Case No. CR 00-6 (D. Ct. Thurston County, Nebraska, Dec. 14, 2000); see also http://dcs-inmatesearch.ne.gov/Corrections/COR_input.html.

On July 23, 2001, the Nebraska Attorney General issued a memorandum to the Director of the Nebraska Department of Environmental Quality confirming "[a] large portion of Pender lies outside the diminished boundaries of the Omaha Reservation as a result of the 1882 Act." J.A. 157-83. Later, on February 15, 2007, the Nebraska Attorney General issued an opinion which also concluded that the land west of the railroad right-of-way was not part of the Omaha Reservation. J.A. 215; Neb. Op. Atty. Gen. No. 07005.

In 1953, when Public Law 280 transferred jurisdiction over "All Indian country within the State" of Nebraska to the State, it did not specifically delineate

the boundary lines of such Indian country. 18 U.S.C. § 1162; 28 U.S.C. § 1360. In 1969, when the State of Nebraska retroceded a portion of that jurisdiction "in the areas of Indian country located in Thurston, County, Nebraska," the State did not define any reservation boundaries in its retrocession. J.A. 1122-24. Even though P.L. 280 and Nebraska's retrocession did not define any reservation boundaries, the United States accepted the retrocession on different terms than what Congress originally transferred and the State retroceded. 35 Fed. Reg. 16598 (1970).[2]

VI. Treatment Of The Disputed Area By The Tribe.

Before 2006, the Omaha never enforced tribal ordinances west of the railroad right-of-way. J.A. 215-16. The Tribe has never offered foster care, medical, welfare, or child protective services in the disputed area. J.A. 216. The Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any governmental or ceremonial activities west of the railroad-right of-way. J.A.

---

[2] In a few limited modern-day instances, the Nebraska Department of Revenue indicated the Reservation existed as originally surveyed. J.A. 216. However, these revenue rulings do not include any historical or legal jurisdictional analysis of the Reservation's boundaries. All of those revenue rulings were also later superseded and rescinded by the Nebraska Department of Revenue prior to this litigation. Neb. Revenue Ruling 99-05-01 (Sept. 29, 2005).

216. The Tribe has no mineral rights or other claims to land in the disputed area. J.A. 216.

VII. Enforcement Of The Ordinance And Subsequent Litigation.

On February 28, 2006, the Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code, promulgating the Beverage Control Ordinance ("Ordinance"). J.A. 187. The Ordinance imposes a licensing scheme and a 10% sales tax on the purchase of alcoholic beverages from any licensee within the reservation. J.A. 187-88. The Ordinance was certified by the Department of Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Shortly after the Ordinance's promulgation, Individual Petitioners received application forms and requests to remit the 10% tax in the mail from the Tribe. J.A. 189. When the Individual Petitioners did not respond, the Tribe sent a second notice to Individual Petitioners informing them that they were subject to the Omaha Tribal Code and to fines up to $10,000.00 per violation. J.A. 189-90.

In response to the Tribe's attempt to enforce the Omaha Tribal Code west of the railroad right-of-way, Individual Petitioners commenced this action. J.A. 56, 66-76, 190. The United States District Court for the District of Nebraska, pursuant to 28 U.S.C. § 1331, granted Individual Petitioners a temporary restraining order against the enforcement of the Ordinance on April 17, 2007. J.A. 190. The district court stayed

further proceedings to exhaust any remedies in the Omaha Tribal Court. J.A. 190. Individual Petitioners filed an action in the Omaha Tribal Court seeking a declaration as to whether Pender, Nebraska lay within the boundaries of the Omaha Indian Reservation and an injunction against any future enforcement of the Ordinance. J.A. 190. On cross-motions for summary judgment, the Omaha Tribal Court determined that the original boundaries of the reservation had not been diminished. J.A. 139, 191.

Proceedings resumed before the federal district court. J.A. 191. The State of Nebraska intervened to retain its longstanding jurisdiction over the geographic area at issue, i.e., the approximately 50,157 acres, including, but not limited to, the Village of Pender, Nebraska. J.A. 285-99. The United States intervened in support of the Tribe. J.A. 300-14. The parties and intervenors filed cross-motions for summary judgment on the issue of whether the Omaha Indian Reservation was diminished following the 1882 Act such that the disputed area was no longer within its borders.

The district court ruled in favor of the Tribe on cross-motions for summary judgment. Pet. App. 77-78. The district court held that ambiguous evidence regarding the first two *Solem* factors – statutory language and legislative history – necessarily foreclosed any possibility that diminishment would be found on a *de facto* basis. Pet. App. 68.

Petitioners appealed to the Eighth Circuit and that court issued a panel opinion affirming the judgment of the district court. Pet. App. 1-8. The panel determined that the "[district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus." Pet. App. 7. Petitioners were denied rehearing en banc. Pet. App. 80-81.

SUMMARY OF THE ARGUMENT

The legal issue in this case is whether the disputed area remains part of the Omaha Indian Reservation, despite both the Omaha and the United States having declined to exercise Indian-country jurisdiction over the area since the late nineteenth century. This is not a matter of mere historical curiosity or academic interest. Rather, the Court's decision will significantly impact the future of an entire community and its residents. If this Court upholds the lower courts' ruling that the disputed area remains part of the reservation, the practical consequences will be profound for the residents of the disputed area after over one hundred years of justifiable reliance upon Nebraska and local governmental institutions and services.

"As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984). In *Solem*, the Court articulated a three-part analysis designed to evaluate whether a surplus land act may have resulted in a diminishment of a federal Indian reservation. *Id.* at 470-72. The Court concluded that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred. This Court has since explained that the diminishment inquiry requires courts "examine all circumstances surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 412 (1994). The doctrine of "*de facto* diminishment" arises from a court's consideration of the third *Solem* factor – events occurring after passage of a surplus land Act. *Solem*, 465 U.S. at 471-72.

This Court has recognized that its ability to rely on express statutory language to discern congressional intent is limited because "the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant." *Solem*, 465 U.S. at 468. Indeed, the diminishment "inquiry is informed by the understanding that . . . Congress did

not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because the notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Id.*

Accordingly, the Court must also consider whether the treatment of the area following the opening of the reservation to non-Indian settlement resulted in *de facto* diminishment. See, *e.g.*, *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 215-16 (2005) (in a different, but related context, reiterating that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may create justifiable expectations"), *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.3 and 604-05 (1977); *Solem*, 465 U.S. at 472; see also *Yankton Sioux Tribe*, 522 U.S. at 356-57

Solem explained the nature of *de facto* diminishment as follows:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded

> into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.
>
> In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of the opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.
>
> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments. Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.

Solem, 465 U.S. at 471-72 n.12 & 13 (internal citations omitted).

The demographic and jurisdictional history of the disputed area west of the railroad right-of-way, necessitates a finding of *de facto* diminishment. "[A] contrary conclusion would seriously disrupt the

justifiable expectations of the people living in the area." *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

ARGUMENT

I. NEBRASKA'S UNCHALLENGED HISTORY OF JURISDICTION OVER THE DISPUTED AREA SHOWS DIMINISHMENT.

The State of Nebraska has consistently exercised jurisdiction over, and provided governmental services to, the people living in the disputed area west of the railroad right-of-way from 1882 through 2006. The State's exclusive control over an area populated by more than 98% non-Indians has created the justifiable expectations by the residents who live west of the railroad right-of-way that they are not subject to tribal regulation.

There is no dispute that:

- Immediately following the 1882 Act, the major portion of the disputed area was quickly absorbed by settlers, J.A. 357, 486, 490, 500;
- Since the early twentieth century, non-Indians have comprised more than 98% of the area's population, J.A. 208;
- More than 98% of the land in the area was conveyed from the United States to non-Indians, J.A. 204, 206;

- The State of Nebraska exercises criminal jurisdiction over the disputed area, J.A. 145-52, 215-16, 319, 369-72, 609;
- Neither Pender nor its residents have ever been subjected to the jurisdiction of the Tribe, J.A. 215-16;
- The Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any governmental or ceremonial activities there, J.A. 216;
- The Tribe has no mineral rights or other claims to land in the disputed area, J.A. 216; and
- Before 2006, the Tribe never enforced tribal ordinances west of the railroad right-of-way. J.A. 215-16.

From 1882 until 2006, the State of Nebraska consistently exercised jurisdiction over Pender without any dispute or objection from the Omaha or the United States. J.A. 145-52, 215-16, 319, 369-71, 605. This Court has recognized that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, may create justifiable expectations." *City of Sherrill, N.Y.*, 544 U.S. at 215-16 (quoting *Rosebud Sioux Tribe*, 430 U.S. at 604-05); *Hagen*, 510 U.S. at 421. The Nebraska residents living in the disputed area have developed justifiable expectations over the past 130 years. The Eighth Circuit's decision alters the status quo by expanding the jurisdiction of the Tribe over the disputed area.

A. Disputed Area Has No History Of Indian Character.

The demographics of the area are undisputed and confirm diminishment of the Omaha Reservation. Prior to the passage of the 1882 Act, the disputed area had not been settled by either Indians or non-Indians. J.A. 583, 657. According to a report submitted by the local Indian agent leading up to passage of the 1882 Act, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 657. Neither did Congress expect the Indians to select their allotments west of the railroad right-of-way. As Representative Valentine stated while specifically discussing the provision to allow Indians to select allotments west of the railroad right-of-way prior to the lands being sold: "They do not care about making selections over on that side of the road at all." J.A. 739.

Alice Fletcher, who was appointed by the Secretary of the Interior as a special agent to oversee the allotment process, urged the Omahas to select land near the railroad right-of-way. J.A. 203-04, 347-48, 598. Few Omahas accepted Fletcher's advice; most preferred the eastern part of the reservation for its access to water and timber. J.A. 203-04, 347-48, 598. "No Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99.

In contrast, according to Senator Saunders, settlers were "ready to buy the land and put it in cultivation." J.A. 583, 644, 1227. The rapid settlement anticipated by Congress quickly materialized.

In 1884, the Secretary of the Interior reported to Congress that "[u]pon opening the lands to settlement the majority thereof was quickly absorbed by settlers." J.A. 357. Local Agent Wilkinson confirmed the disputed area was "immediately occupied" by settlers. J.A. 486.

One of those early settlers after the 1882 Act, W.E. Peebles, left the town of Oakland, Nebraska, purchased a 160-tract of land west of the railroad right-of-way, and platted the townsite which quickly became the village of Pender. J.A. 208, 357. Lots within the townsite were sold on April 7, 1885. J.A. 208, 357. Soon, Pender became the county seat of Thurston County, Nebraska and between 1885 and 1889, Pender grew to a population of more than 300. J.A. 357. Available data from the U.S. Census Bureau for the relevant townships in Thurston and Cuming Counties indicates that, since at least 1900, the non-Indian population west of the railroad right-of-way has ranged from 98.18% to 99.95%. J.A. 208, 366.

Percentage of non-Indian population by decade:

	1900	1910	1920	1930	1990	2000
West of Railroad ROW	99.73%	98.18%	99.95%	99.16%	99.58%	99.17%
East of Railroad ROW	59.47%	75.12%	85.20%	78.95%	42.03%	30.22%

J.A. 368.

The historical record indeed shows that the population of Tribe members living west of the railroad right-of-way has always been extremely small. Since 1900, there have never been more than 72 Indians (1.8% of the total population) living on this land, and as of the year 2000, only 21 Indians (0.83% of the total population) lived there. J.A. 365-68. These facts stand in stark contrast to the demographics of the land east of the railroad right-of-way, where 2337 Indians (69.78% population) lived as of 2000. J.A. 366, 368. This near-total absence of Indian character, combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

Furthermore, the demographic history supports a finding of *de facto* diminishment. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471 (citing *Rosebud Sioux Tribe*, 430 U.S. at 588 n.3; and *DeCoteau*, 420 U.S. at 428); accord *Yankton Sioux Tribe*, 522 U.S. at 356-57. "In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, [courts] look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Solem*, 465 U.S. at 471-72. The demographic history here – both before

and after the 1882 Act – show that this land has never had any Indian character and that Congress expected the disputed area to no longer be part of the reservation.

B. Less Than 2% Of The Total Acreage Of The Disputed Area Was Allotted To Tribal Members.

Non-Indian land use in the disputed area mirrors its demographics and confirms diminishment. Following the survey and appraisal of the segregated land west of the right-of-way, it was opened for settlement on April 30, 1884. J.A. 204. "Upon opening the lands to settlement the majority thereof was quickly absorbed by settlers. By September 1, 1884, 311 filings had been made, embracing about 43,000 acres." J.A. 357.

In contrast, when given the option of selecting their land west of the railroad right-of-way, nearly all Omahas preferred the eastern part of the reservation. J.A. 203-04, 347-48, 598. Only 10 to 15 Indian allotments totaling 876 of the approximately 50,000 acres, less than 2% of the total acreage, in the area had been allotted to Tribal members. J.A. 204, 350. In total, Indian allotments either wholly or partially in the disputed area taken by members of the Tribe represent approximately 1.72% of the total acreage west of the railroad right-of-way. J.A. 204. The remaining 98.28% of the land was conveyed from the United States to non-Indians, with the final remaining parcel selling in 1913. J.A. 206. And by 1919, "all

lands allotted to Omaha Tribe members west of the Railroad right-of-way had been patented in fee simple; thus, no trust land remained west of the demarcation line." J.A. 206, 360.

The combined statistics on demographics and land use are even more compelling than those described in the four cases where this Court found diminishment. See *Yankton Sioux Tribe*, 522 U.S. at 356-57 (two-thirds of the population was non-Indian and more than 90% of the reservation lands were in non-Indian lands); *Hagen*, 510 U.S. at 421 (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux Tribe*, 430 U.S. at 605 (involved land that was "over 90% non-Indian both in population and in land use"); *DeCoteau*, 420 U.S. at 428 (approximately 90% of the population was non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). This near-total absence of Indian character, combined with the State of Nebraska's consistent assertion of jurisdiction over this land, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421; see also *City of Sherrill, N.Y.*, 544 U.S. at 197.

C. Nebraska's History Of Jurisdiction Over The Disputed Area.

Nebraska's longstanding exercise of jurisdiction logically flows from Congress' intent. Senator Ingalls, a member of the committee that reported the Act, explained that under the Act "*the interest and control and jurisdiction of the United States is absolutely relinquished.*" J.A. 647 (emphasis added). In 1885, the Commissioner of Indian Affairs clearly agreed when he advocated for the Winnebagoes to realize a "great benefit" from legislation "substantially similar" to the "Omahas (act of August 7, 1882)" and "be subject to the laws, both civil and criminal, of the State (Nebraska)." J.A. 503. It is unsurprising then, that the State of Nebraska immediately assumed jurisdiction over the area.

The United States and the Tribe abided by this arrangement for more than a century. Indeed, as recently as 1999, the disputed area was "routinely patrolled by State and Village of Pender officers; neither officers of the Tribe nor the Bureau of Indian Affairs have provided law enforcement presence in the opened lands." J.A. 151. This "longstanding assumption of jurisdiction" by Nebraska over the disputed area, which is over 90% non-Indian both in population and in land use, demonstrates the parties' understanding that the 1882 Act diminished the Omaha Reservation. *Rosebud Sioux Tribe*, 430 U.S. at 604-05.

Notably, in 1999, the United States voluntarily relinquished authority to the State of Nebraska to prosecute Damon Picotte, a Winnebago tribal member, in state court for committing a murder in the Village of Pender. Picotte's murder was committed fifteen years after the 1984 *Solem* decision in which this Court upheld granting a writ of habeas corpus because the State of South Dakota did not have jurisdiction to prosecute a defendant for a crime committed on land that was not diminished from an Indian reservation. J.A. 145-52. Remarkably, the United States is now taking a position entirely inconsistent with its 1999 post-*Solem* action, where it depended upon the State of Nebraska to prosecute Picotte for his serious crime.

Attempting to cloud the clear jurisdictional picture showing the State of Nebraska assuming and exercising consistent jurisdiction of the disputed area, the United States has previously pointed to the inclusion of alternative boundary lines when the United States accepted Nebraska's retrocession of jurisdiction following P.L. 280. Br. in Opp. to Pet. 7; see 35 Fed. Reg. 16598 (1970). However, when P.L. 280 transferred jurisdiction over "All Indian country within the State" of Nebraska to the State in 1953 it did not delineate the boundary lines of such Indian country. 18 U.S.C. § 1162; 28 U.S.C. § 1360. In 1969, when the State of Nebraska retroceded a portion of that jurisdiction "in the areas of Indian country located in Thurston County, Nebraska," the State did not define any reservation boundaries in its

retrocession. J.A. 1122-24. The United States' acceptance of retrocession on different terms than what Congress originally transferred, and the State later retroceded, does not alter the intent behind the 1882 Act that the "jurisdiction of the United States [was] absolutely relinquished." J.A. 647. Regardless of the acceptance of retrocession language, the State of Nebraska immediately assumed exclusive jurisdiction over the area in 1882 without contest from the Tribe or United States until recently.

D. All Governmental Services In The Disputed Area Are Provided By State And Local Authorities.

Nebraska's longstanding assumption of jurisdiction in the disputed area is not limited to criminal matters. In the disputed area, *all governmental services are provided by state and local agencies*. J.A. 319. The Tribe has never sought to enforce the provisions of the Omaha Tribal Code west of the right-of-way although the Tribe has enforced its code east of the railroad right-of-way. J.A. 215-16. Nor does the Tribe offer foster care, medical, welfare or child protective services west of the railroad right-of-way. J.A. 216. Also notable, the Tribe does not have an office and does not operate a school, industry, or business in the disputed area. J.A. 216. The Tribe does not have a single school to educate the children living in the disputed area. The Tribe's seat of government is not in the disputed area, but instead twenty miles east of the area in Macy, Nebraska. J.A.

216. Put simply, the historical record is devoid of facts suggesting the Tribe ever sought to assert jurisdiction over the town of Pender until the twenty-first century. J.A. 609.

E. United States History Of Treating The Disputed Area As Diminished.

For over a century after the 1882 Act, the United States exhibited a steady pattern regarding the disputed area confirming that it had absolutely relinquished all jurisdiction and control:

- *1883*: United States' map of reservation shows boundary does not extend west of the railroad right-of-way. J.A. 1298.
- *1884*: Disputed area not included in OIA acreage report and Indian Agent Wilkinson describes settlers as "surrounding the reservation." J.A. 206, 615.
- *1885*: Commissioner of Indian Affairs reports all lands in the disputed area had been sold to non-Indian settlers, are "subject to the laws, both civil and criminal, of the State (Nebraska)," and the remaining lands are "within the diminished reserve." J.A. 503. Indian Agent Wilkinson confirms the "Omahas have reduced their reservation." J.A. 350, 1076.
- *1888*: Disputed area not included in OIA acreage report and United States' map of reservation shows boundary does not

extend west of the railroad right-of-way. J.A. 206, 1299.

- *1890*: Indian Agent Ashley reports the reservation does not include the portion sold and occupied by white purchasers. J.A. 606, 798.
- *1892*: Indian Agent Ashley reports the reservation does not include the portion sold and occupied by white purchasers and United States' map of reservation shows boundary does not extend west of the railroad right-of-way. J.A. 817, 1300.
- *1898*: Disputed area not included in OIA acreage report. J.A. 207, 517.
- *1900*: Disputed area not included in OIA acreage report. J.A. 207, 522.
- *1901*: Indian Agent Mathewson reports the railway forms the southwestern boundary of the reservation. J.A. 207, 841.
- *1904*: Superintendent in charge of Omaha Agency reports the western boundary line of the reservation is the railway line. J.A. 607; see also J.A. 1076.
- *1906*: Disputed area not included in OIA acreage report. J.A. 207, 525.
- *1909*: Disputed area not included in OIA acreage report. J.A. 207, 531.
- *1911*: Disputed area not included in OIA acreage report. J.A. 207, 536.

- *1935*: Annual Statistical Report for Omaha Reservation lists the Omaha Reservation as encompassing 137,495.47 acres and "Sale – Land W. of RR." as a "reduction to the reservation." J.A. 208, 541.
- *1964*: Bureau of Indian Affairs "Base Map" of the reservation shows boundary does not extend west of the railroad right-of-way and reiterates "[t]his Office holds the opinion that the [1882] Act of Congress has DIMINISHED the borders of the Omaha Reservation." J.A. 562-64, 969-70 (emphasis in original).
- *1989*: Office of the Solicitor of the United States Department of Interior confirms the "western boundary of the Omaha Reservation is the centerline of the abandoned [railroad] right of way." J.A. 213-14, 369-70, 1193.
- *1999*: The United States does not challenge the State of Nebraska's assertion of criminal jurisdiction over Winnebago Tribe Member Picotte when he shot and killed a non-Indian in her Pender home. J.A. 145-52.

Despite this steady pattern, and only in 2012 after the current litigation was filed by the Individual Petitioners disputing the Tribe's authority to tax liquor sales in Pender, the Department of Interior withdrew the 1989 opinion and appears to have officially changed its view for the convenience of litigation. J.A. 214, 281.

The Tribe and United States have attempted to inject ambiguity by focusing on recent efforts by the Department of the Interior and other federal agencies to assert jurisdiction that are "too far removed temporally from the [1882 Act] to shed much light on Congressional intent." *Osage Nation v. Irby*, 597 F.3d 1117, 1126 (10th Cir. 2010). Indeed, authorities' treatment of the disputed area "in the years immediately following the opening," *Solem*, 465 U.S. at 471, is far more probative than actions over a century after the 1882 Act. Put simply, "in light of the clear assumption of jurisdiction over the past [130] years by the State . . . on the territory now in dispute, and acquiescence by the Tribe and Federal Government, this sporadic, and often contradictory history of congressional and administrative actions in other respects carries but little force." *Rosebud Sioux Tribe*, 430 U.S. at 604, n.27; see also *Yankton Sioux Tribe*, 522 U.S. at 356-57 (refusing to allow modern attempts by the Tribe to exercise civil, regulatory, or criminal jurisdiction to change its conclusion that "[t]he State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day," reinforced its holding of diminishment).

The Omaha Reservation was diminished long ago. The State of Nebraska's longstanding assumption of jurisdiction, acquiesced to by the Tribe and the United States, over the disputed area shows *de facto* diminishment of the reservation which is also

consistent with the legislative history that the 1882 Act would diminish the reservation.

II. THE CONTEXT SURROUNDING THE 1882 ACT SHOWS CONGRESS INTENDED TO ALTER THE RESERVATION'S BOUNDARIES.

> The context in which Congress enacted the 1882 Act shows Congress intended to diminish the Reservation. "When events surrounding the passage of a surplus land Act – particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress – unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, [courts] have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remain unchanged."

Solem, 465 U.S. at 471.

The "touchstone to determine whether a given statute diminished or retained reservation boundaries is congressional purpose." *Yankton Sioux Tribe*, 522 U.S. at 343. The congressional purpose prior to and under the 1882 Act to diminish the reservation was clear.

A. Prior To The 1882 Act, Congress Repeatedly Attempted To Separate And Sell The Disputed Area.

In both *Hagen* and *Rosebud Sioux Tribe*, this Court concluded congressional acts diminished the reservations by viewing those acts through the lens of earlier congressional action. See *Hagen*, 510 U.S. at 415-16 (refusing to interpret the last congressional act, which had only general allotment language, in isolation "because the baseline intent to diminish the reservation expressed in [an earlier act] survived the passage of the [later act]"); *Rosebud Sioux Tribe*, 430 U.S. at 612-13 (construing the 1904, 1907, and 1910 Acts, which affected different portions of the same reservation, together to conclude Congress intended to diminish the reservation with each Act). As in *Hagen* and *Rosebud Sioux Tribe*, this Court must read the 1882 Act in light of its historical context, including the repeated efforts of the Tribe and Congress to diminish the reservation in the years leading up to the 1882 Act.

On two occasions in 1871, the Tribe, through its designated federal agent, petitioned Congress to sell the uninhabited westernmost portion of the reservation in order to obtain additional financial resources. J.A. 194, 419, 424, 573. The Tribe requested that the 50,000 acres "be separated from the remainder" of the reservation and offered for sale. J.A. 573, 629. The Commissioner of Indian Affairs supported these requests and reiterated, "I believe that the general idea of diminishing these reservations for the purpose of

securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194, 625.

Congress responded by enacting the Act of June 10, 1872 ("1872 Act"), providing for the sale of 50,000 acres "to be taken from the western part" of the reservation and "separated from the remaining portion of said reservation." J.A. 631. Although the 1872 Act authorized land sales from other tribal reservations, it is significant that those other sales (i.e., land other than the disputed area involved in this case) were not identified as involving a separation from the reservations. J.A. 632-34. The 1872 Act is very much a part of the legislative history of the 1882 Act.

Because of the availability and pricing of other land, the 1872 Act only accomplished the sale of 300 acres. J.A. 195, 333-35. In 1874, the Commissioner of Indian Affairs reported that the reservation contained 192,867 acres, but he continued: "By the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale [and are held] in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 195, 360-61, 504. This description, even in 1874, indicated the Commissioner considered the disputed area as detached from the remainder of the reservation as a result of the 1872 Act.

The Tribe continued to request to have the uninhabited land sold. In 1880, Congress considered legislation, as explained by Senator Alvin Saunders of Nebraska, to facilitate the sale of the western 50,000

acres of the reservation not sold under the 1872 Act because of price. J.A. 196-97. The 1880 proposal did not advance. J.A. 196, 197. Again in December of 1881, Senator Saunders proposed another bill authorizing the sale of land, but this proposal did not advance either. J.A. 336-37. Although Senator Saunders' 1880 and 1881 proposals did not advance, it appears that Congress understood the Tribe wanted the land sold and that the land east of the railroad right-of-way would constitute the Tribe's diminished reserve.

During the intervening period between the 1872 Act and the 1882 Act, the Omaha granted the Sioux City and Nebraska Railroad Company a right-of-way through the reservation, beginning at the northern edge and generally running southward along the Middle and Logan creeks. J.A. 336. Critically, the railroad right-of-way now provided a clear demarcation of the boundary-line west of which all land would be sold. J.A. 360, 1193.

B. The Legislative History Of The 1882 Act Demonstrates The Understanding The Reservation Would Shrink As A Result Of The Legislation.

The 1882 Act was nearly identical to the 1872 Act, both in its terms and objectives. As explained by Senator Saunders: "It happens to be one of those few cases where I believe everybody is satisfied to have a bill of this kind passed (J.A. 582, 644), ... Twice they have expressed themselves already in open council in

favor of it, and the bill requires that it shall be done a third time, and that the land shall not be sold until they do decide in open council that they want it sold." J.A. 469.

According to a report submitted by the local Indian agent, "there are no Indians living on the western portion of the Omaha Reservation." J.A. 657. Therefore, Senator Ingalls explained under the bill that "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished." J.A. 647. The 1882 Act "practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." J.A. 647. Senator Dawes explained: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the [Omaha] reservation too small. I went personally to the Indian Bureau to satisfy myself upon that point, and by the Commissioner of Indian Affairs I was assured that it would leave an ample reservation." J.A. 683.

In the House of Representatives, Representative Edward Valentine of Nebraska added: "they do not care about making selections over on that side of the road at all." J.A. 201, 739. Representative Valentine further explained:

> You cannot find one of those Indians that does not want the western portion sold, not

> the eastern part. A railroad has been built and is now being operated through that reservation. The Indians say they want that portion west of the railroad sold. This could be done under existing law, but if sold under the existing law it would be sold to persons who would not be required to occupy it. Therefore, the Indians say, "Do not sell the land under the present law, but pass a new law and sell it only to persons who will reside upon it and cultivate it." When it is sold upon these conditions, the white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to the railroad from the east and get the benefit of these improvements.

J.A. 201, 726. Local Omaha and Winnebago Agent George Wilkinson subsequently verified this information and reported that the tribe consented to the act on May 5, 1883. J.A. 345.

C. The 1872 And 1882 Acts Predate The Dawes Act And Are Unlike General Allotment Acts.

It is important to distinguish the 1872 and 1882 Acts "from a run-of-the-mill allotment act." *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657, 663 (7th Cir. 2009). The vast majority of reservation surplus land passed out of tribal control following the 1887 enactment of the General Allotment Act, also known as the Dawes Act. In fact, all of this Court's opinions

deciding whether a reservation was diminished or disestablished involved a pre-Dawes allotment act. See *Hagen*, 510 U.S. at 402-07 (analyzing a series of acts in the early 1900s); *Yankton Sioux Tribe*, 522 U.S. at 329 (analyzing 1894 Act); *Solem*, 465 U.S. at 464 (analyzing 1908 Act); *Rosebud Sioux Tribe*, 430 U.S. at 584 (analyzing 1904, 1907, and 1910 Acts); *DeCoteau*, 420 U.S. at 441-42 (analyzing 1891 Act); *Mattz v. Arnett*, 412 U.S. 481, 484-85 (1973) (analyzing 1892 Act); *Seymour v. Supt. of Wash. State Pen.*, 368 U.S. 351 (1962) (analyzing 1906 Act).

The 1872 and 1882 Acts at issue in this litigation predate and differ from post-Dawes Act surplus allotment acts, in which individual parcels of land were allotted to tribe members with the remaining parcels declared surplus and opened for settlement by, and sale to, non-Indians. See, *e.g.*, *Solem*, 465 U.S. at 466-67. This is significant because instead of creating a checkerboard pattern of land ownership that sought to integrate non-Indian settlers amongst tribal members, here Congress sought to sell to non-Indian settlers land in an area that was "slice[d] off from the [. . .] reservation." *Stockridge-Munsee Cmty.*, 554 F.3d at 663.

The 1872 and 1882 Acts were consistent with the view of the Commissioner of Indian Affairs F.A. Walker at the time of the 1872 Act, who believed Indians should still be separated and secluded on reservations. Walker believed that any reductions to reservations should be accomplished by "cutting off

distinct portions from the outside, and not in such a way as to allow veins of white settlement to be injected, no matter whether along a stream or along a railway." J.A. 593.

The actions of Congress and the Tribe were also consistent with this goal. The Tribe had requested the disputed area be "separated from the remainder" (J.A. 629), and Senator Ingalls agreed the bill would "break[ ] up that portion at least of the reservation which is to be sold" and "segregate[ ]" the lands occupied by Tribe members. J.A. 647. While Petitioners acknowledge that 10-15 allotments were selected by tribal members in the disputed area, 5 of those allotments were largely located east of the railroad right-of-way, and "[n]o Indians chose land in the heart of the sale area, reflecting their lack of interest in these lands." J.A. 598-99. Congress recognized that even the land selected by Indians would be "segregated from the remainder of the reservation . . . so that the interest and control of and jurisdiction of the United States is absolutely relinquished." J.A. 647. The ultimate goal was not to integrate land ownership, but to separate the disputed area from the reservation.

Both Congress and the Tribe intended to separate and segregate the western portion of the reservation from the eastern portion by virtue of the railroad right-of-way as the western boundary, with minimal, if any, Tribe members selecting allotments on the western side, and no settlement by non-Indians on the eastern side allowed. This backdrop logically influences interpretation of the

congressional purpose behind the 1882 Act and distinguishes that Act from the run-of-the-mill allotment act.

III. THE 1882 ACT SUPPORTS DIMINISHMENT.

A. An Explicit Reference To Cession Is Not A Prerequisite For A Finding Of Diminishment.

This Court has repeatedly emphasized that "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Solem*, 465 U.S. at 471; accord *Hagen*, 510 U.S. at 411 ("[W]e have never required any particular form of words before finding diminishment."). This is in part because "Congress . . . generally did not distinguish between title and boundary concerns and, in fact, seemed oblivious to future disputes that might arise over Indian jurisdiction." *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1394 (10th Cir. 1990). "Today a reservation can encompass land that is not owned by Indians, 18 U.S.C. § 1115(a), but back then, the 'notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar.'" *Stockbridge-Munsee Cmty.*, 554 F.3d at 662 (quoting *Solem*, 465 U.S. at 468). Additionally, "Congress believed that all reservations would soon fade away – the idea behind the allotment acts was the ownership of property would prepare Indians for citizenship in the United States, which, down the road, would make reservations obsolete." *Id.* "[G]iven this backdrop, [courts]

cannot expect Congress to have employed a set of magic words to signal its intention to shrink a reservation." *Id.* Here, the lower courts found the statutory language unclear. Pet. App. 6, 76.

The language of the 1882 Act, while not explicitly addressing the issue, does contain evidence that Congress intended that the original boundaries of the Tribe's reservation would be diminished. The 1882 Act authorized the Secretary of the Interior "to cause to be surveyed, if necessary, and sold, all that portion of [the Omaha Reservation] in the State of Nebraska lying west of the right of way. . . ." J.A. 227. Section 1 defines the scope of the land potentially diminished. The Act goes on to provide "[t]hat after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement." *Id.* Under Section 2, the land in question was clearly opened to settlement by non-Indians. Upon settlement and compliance with the terms of sale, "patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts." *Id.* at 227-28.

Additionally, Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settlers' payment period on multiple occasions. J.A. 205, 352. The 1888 extension directed the Secretary of the Interior to declare certain purchasers' tracts forfeited due to default on payment. J.A. 206, 352. Upon forfeiture, a settler's

tract was to be sold at public auction, not revert back to the Tribe. J.A. 206, 352, 360.

The Court in *Rosebud Sioux Tribe* and *Hagen* found diminishment when similar disparities in language existed. Thus, "the notion that [clear language of express termination] is the only method by which congressional action may result in disestablishment [or diminishment] is quite inconsistent," *Rosebud Sioux Tribe*, 430 U.S. at 588 n.4 (emphasis added), with the "traditional approach to diminishment cases, which requires [courts] to examine all the circumstances surrounding the opening of a reservation." *Hagen*, 510 U.S. at 411 (emphasis added). Together, *Rosebud Sioux Tribe* and *Hagen* show that the lack of explicit references to cession and language distinctions between the 1882 Act and prior Omaha Indian Treaties are neither dispositive nor particularly illuminating of Congress' intent to diminish the reservation.

Under this holistic framework considering all circumstances, both the Seventh and Tenth Circuits have found reservations diminished/disestablished even though the operative congressional act did not have cession or sum certain payment language. See *Stockbridge-Munsee Cmty.*, 554 F.3d at 662-65 (concluding the Stockbridge-Munsee Indians' Reservation was diminished despite the fact that "[t]he 1871 Act includes no hallmark diminishment language"); *Osage Nation*, 597 F.3d at 1127 (concluding the 1906 Osage Allotment Act disestablished the Osage Reservation). Given the circumstances surrounding the disputed

area in this case, the lower courts erred by not reaching a similar conclusion.

It is also significant that when opening the land west of the railroad right-of-way, Congress did not reserve any portion of these lands for Indian use or carve out any mineral or other land rights from the opened area. J.A. 227-33. These facts distinguish the surrounding circumstances of this case from those in *Solem*, where the allotment act envisioned and/or provided for future tribal use of the land. *Solem*, 465 U.S. at 474 (explaining that the Cheyenne River Act authorized the Secretary "to set aside portions of the opened land for agency, school and religious purposes . . . for the benefit of said Indians" and reserved mineral resources in the land for the whole tribe). Such provisions "strongly suggest that the unalloted opened lands would for the immediate future remain an integral part" of the reservations. *Solem*, 465 U.S. at 474. Conversely, the absence of such provisions in the 1872 and 1882 Acts suggests Congress did not view the land west of the railroad right-of-way as continuing to be a part of the reservation. Rather, all of the land west of the railroad right-of-way was available for settlement and transfer to non-Indian settlers.

B. The Tribe's Lack Of Residence On The Disputed Area Explains The Lack Of Cession Language.

The absence of explicit cession language in the 1872 and 1882 Acts is even less illuminating as to

Congress' intent in light of the historical context. The circumstances on the reservation are distinguishable from those present with other surplus land acts. For example, in *Mattz*, 412 U.S. at 489, the Indians were residing on the land at the time of the act's passage. Thus, the Court emphasized the need for "vacating" language in the act. But here, when debating passage of the 1882 Act, members of the Tribe did not reside on the disputed area. J.A. 583, 657, 726, 739. Rather, the Tribe members resided east of the railroad right-of-way. J.A. 330-31. This was a commonly understood fact in 1882. Accordingly, there was less need to specifically provide some of the hallmark diminishment language that was present in other surplus land acts.

Furthermore, understanding the historical context helps explain why the inclusion of hallmark cession language in the 1854 and 1865 Treaties with the Tribe, as compared to the absence of such language in the 1882 Act, is not particularly enlightening. Unlike the 1882 Act, the 1854 Treaty required the Tribe to physically vacate land, making express cession language necessary. J.A. 328-29, 1019-28 (explaining the effect of the 1854 Treaty). The 1865 Treaty's use of cession language was also necessary considering the purpose of the treaty was to provide land for the United States to set up a reservation for the Winnebago Tribe. J.A. 329 (explaining the effect of the 1865 Treaty). To accomplish this objective, Congress needed to first eliminate the entirety of the

Tribe's right to the land before giving the same land to the Winnebago Tribe for its reservation.

With the 1882 Act, Congress did not face the same need to transfer full and complete title away from the Tribe, as that would occur once the land was either allotted to tribe members or settled upon and sold to non-Indians. After all, "Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest." *Solem*, 465 U.S. at 468. Congress assumed at that time that the reservation status of the Indian land was coextensive with tribal ownership. See *Solem*, 465 U.S. at 468.

The practical reality of the circumstances surrounding the land transfers dictated that the 1854 and 1865 Treaties needed to include this cession language to accomplish their objective, while the 1882 Act did not.

IV. THE PUBLIC'S JUSTIFIABLE EXPECTATIONS WILL BE UPSET BY EXPANDING THE JURISDICTION OF THE TRIBE OVER 130 YEARS AFTER DIMINISHMENT.

For over 130 years, the people and businesses of the Pender, Nebraska area have developed justifiable expectations that their community was under the jurisdiction of the State of Nebraska. The lower courts' decisions in this litigation destroyed that

longstanding status quo and upset the public's justifiable expectations.

Petitioners expect the Tribe and United States will continue to downplay the effect of altering the status quo by expanding the jurisdiction of the Tribe over 130 years after diminishment. Doing so, however, ignores this Court's observations that "when an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country *seriously burdens the administration of state and local governments*." *Hagen*, 510 U.S. at 420-21 (quoting *Solem*, 465 U.S. at 471-72, n.12 (emphasis added)).

For over a century, State and local governments have relied on the 1882 Act, and the actions and/or inaction taken by the Tribe and United States, in asserting their own civil and criminal jurisdiction in the disputed area. Notably, Respondents' recent effort to assert jurisdiction in the disputed area is not a comprehensive plan to administer a broad array of government services in and around Pender, but rather simply to derive revenue from the sale of alcohol in Pender's liquor retailers and bars. In service of that goal, Respondents ask this Court to rewrite history. The Court should decline Respondents' invitation.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted this 16th day of November, 2015.

DOUGLAS J. PETERSON
Nebraska Attorney General

JAMES D. SMITH
Solicitor General
of Nebraska
Counsel of Record

RYAN S. POST
DAVID A. LOPEZ
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov

Attorneys for the
State of Nebraska

GENE SUMMERLIN
MARNIE A. JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, NE 68508-2967
(402) 434-8040
gene.summerlin@
huschblackwell.com
marnie.jensen@
huschblackwell.com
mark.hill@
huschblackwell.com

Attorneys for Individual
& Village Petitioners

No. 14-1406

In the
Supreme Court of the United States

STATE OF NEBRASKA, ET AL.,

Petitioners,

v.

MITCH PARKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR OMAHA TRIBAL COUNCIL RESPONDENTS

MAURICE R. JOHNSON
Attorney General
Omaha Tribe of Nebraska
100 Main Street
Macy, NE 68039

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Omaha Tribal Council Respondents

(Additional Counsel Listed on Inside Cover)

December 16, 2015

NORA M. KANE
STINSON LEONARD STREET LLP
1299 Farnam St.
Suite 1500
Omaha, NE 68102

MARK J. PETERSON
PETERSON LAW OFFICE, LLC
5201 Chicago Street
Omaha, NE 68132

PATRICIA A. ZIEG
PATRICIA A. ZIEG LAW
OFFICES, LLC
1327 South 35th Ave.
Omaha, NE 68105

QUESTION PRESENTED

This Court has repeatedly emphasized that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). As with other legislative actions relinquishing sovereignty, the "congressional purpose" in diminishing a reservation must be "clear and plain." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998). To discern the congressional intent behind the Act of Congress alleged to work the diminishment, three factors are relevant: (1) the text of the relevant statute, which in this context, like every other, is the "most probative evidence" of congressional intent; (2) the events surrounding that statute's enactment (*i.e.*, the legislative history); and, (3) to "a lesser extent," post-enactment events and demographic trends. *Solem*, 465 U.S. at 470-72. After examining all three *Solem* factors, the Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit held that Congress did not diminish the boundaries of the Omaha Indian Reservation by the Act of August 7, 1882 ("1882 Act"), ch.434, 22 Stat. 341.

The question presented is whether Congress demonstrated a "clear and plain" intent to diminish the boundaries of the Omaha Indian Reservation by passing the 1882 Act.

PARTIES TO THE PROCEEDING

The list of Petitioners included in Petitioners' November 16, 2015 merits brief is accurate.

Respondents are Mitch Parker, in his official capacity as Chairman of the Omaha Tribal Council; Barry Webster, in his official capacity as Vice-Chairman of the Omaha Tribal Council; Amen Sheridan, in his official capacity as Treasurer of the Omaha Tribal Council; Rodney Morris, in his official capacity as Secretary of the Omaha Tribal Council; Orville Cayou, in his official capacity as Member of the Omaha Tribal Council; Eleanor Baxter, in her official capacity as Member of the Omaha Tribal Council; Ansley Griffin, in his official capacity as Member of the Omaha Tribal Council and as the Omaha Tribe's Director of Liquor Control (the "Omaha Tribal Council Respondents," or "Tribal Respondents"); and the United States (collectively, "Respondents"). The Tribal Respondents were defendants in the district court proceedings and appellees before the Eighth Circuit. The United States was Defendant-Intervenor before the district court and an appellee in the Eighth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Background on Statutory Diminishment of Indian Reservations 3
B. History of the Omaha Reservation and the 1882 Act 6
C. The Omaha Tribe's Beverage Control Ordinance and Petitioners' Complaint 9
D. The District Court's Opinion 10
E. Eighth Circuit's Opinion 14
SUMMARY OF ARGUMENT 15
ARGUMENT 22
I. The Text Of The 1882 Act Makes Clear That Congress Did Not Intend To Diminish The Omaha Reservation 22
A. Interpretation of the 1882 Act Is Guided by Three Bedrock Principles That This Court Has Repeatedly Reaffirmed 23
B. The 1882 Act Contains No Telltale Signs of Congressional Intent to Diminish 25
C. The 1882 Act Closely Resembles Other Statutes That Did Not Diminish Reservations 26

D. Congress Knew Precisely How to Diminish the Omaha Reservation Yet Chose Not to Do So in the 1882 Act 28

E. Petitioners' Brief Discussion of the Statutory Text Does Not Support a Finding of Diminishment 30

II. The 1882 Act's Legislative History And Surrounding Circumstances Indicate Congressional Intent Not To Diminish The Reservation 33

A. The Circumstances Surrounding the 1882 Act Strongly Suggest Congressional Intent Not to Diminish 34

B. The 1882 Act's Legislative History Contains Evidence That Congress Did Not Intend to Diminish 37

C. The Legislative History Cited by Petitioners Does Not Show Clear Congressional Intent to Diminish 38

III. Post-Enactment History And Demographic Trends Do Not Reflect Clear Congressional Intent To Diminish The Reservation 43

A. Use of Post-Enactment History Is Highly Disfavored and Should Be Used With Great Caution 43

B. Statutes Enacted Shortly After the 1882 Act Demonstrate Congressional Intent Not to Diminish 44

C. The "Mixed Record" of Other Post-Enactment Evidence Sheds Little Light on Congress' Intent 47

IV Finding Diminishment Based On The "Mixed Record" Of Evidence On The Third *Solem* Factor Would Produce Harmful And Anomalous Consequences 56

CONCLUSION 60

TABLE OF AUTHORITIES

Cases

Am. Tobacco v. Patterson,
456 U.S. 63 (1982) 39

Arlington Cent. Sch. Dist. v. Murphy,
548 U.S. 291 (2006) 23

Ash Sheep v. United States,
252 U.S. 159 (1920) 45

Atkinson Trading v. Shirley,
532 U.S. 645 (2001) 58

Bruesewitz v. Wyeth,
562 U.S. 223 (2011) 20, 25, 43, 46

Caraco Pharm. v. Novo Nordisk,
132 S. Ct. 1670 (2012) 23

City & Cty. of San Francisco v. Sheehan,
135 S. Ct. 1765 (2015) 48

City of Sherrill v. Oneida Indian Nation,
544 U.S. 197 (2005) 55

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 23

CPSC v. GTE Sylvania,
447 U.S. 102 (1980) 43

Cty. of Yakima v. Confederated Tribes of Yakima Indian Nation,
502 U.S. 251 (1992) 24

Dean v. United States,
556 U.S. 568 (2009) 23

DeCoteau v. Dist. Cty. Court,
420 U.S. 425 (1975) 3, 4, 25, 55

District Of Columbia v. Heller,
554 U.S. 570 (2008) 46

Duncan Energy v. Three Affiliated Tribes,
27 F.3d 1294 (8th Cir. 1994) 29

Exxon Mobil v. Allapattah Servs.,
545 U.S. 546 (2005) 33

Hagen v. Utah,
510 U.S. 399 (1994) ..... *passim*

Hartford Underwriters Ins.
v. Union Planters Bank,
530 U.S. 1 (2000) 23

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009) 16, 30

Kasten v. Saint-Gobain Performance Plastics,
563 U.S. 1 (2011) 23

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 23

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 33, 34

Lone Wolf v. Hitchcock,
187 U.S. 553 (1903) 56

Mattz v. Arnett,
412 U.S. 481 (1973) 27, 28, 29

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 16, 24

Mid-Con Freight Sys.
v. Mich. Pub. Serv. Comm'n,
545 U.S. 440 (2005) 34

Montana v. United States,
450 U.S. 544 (1981) 21, 58

Nev. Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) 16, 23, 24

Oliphant v. Suquamish Indian Tribe,
435 U.S. 191 (1978) 21, 58

Osage Nation v. Irby,
597 F.3d 1117 (10th Cir. 2010) 31

Ratzlaf v. United States,
510 U.S. 135 (1994) 23

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 24

Rice v. Rehner,
463 U.S. 713 (1983) 9

Rosebud Sioux v. Kneip,
430 U.S. 584 (1977) ..... *passim*

Sebelius v. Cloer,
133 S. Ct. 1886 (2013) 23

Seymour v. Wash. State Penitentiary,
368 U.S. 351 (1962) 28

Solem v. Bartlett,
465 U.S. 463 (1984) ..... *passim*

South Dakota v. Yankton Sioux,
522 U.S. 329 (1998) ..... *passim*

United States v. Ceccolini,
435 U.S. 268 (1978) 47

United States v. Celestine,
215 U.S. 278 (1909) 5

United States v. SCS Bus. Inst.,
173 F.3d 870 (D.C. Cir. 1999) 43

Vieth v. Jubelirer,
541 U.S. 267 (2004) 57

Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 24

Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 31

Statutes

18 U.S.C. §1161 ..... 9, 58, 59

Act of June 15, 1880, 21 Stat. 199 4

Act of August 7, 1882, 22 Stat. 341 ..... i, 1, 27

Act of Aug. 2, 1886, 24 Stat. 214 45

Act of May 15, 1888, 25 Stat. 150 45

Act of Aug. 19, 1890, 26 Stat. 329 45

Act of Aug. 11, 1894, 28 Stat. 276 45

Act of May 6, 1910, 36 Stat. 348 46

General Allotment Act, 24 Stat. 388 (1887) 4

Neb. Rev. Stat. §13-1503 ..... 52, 57

Neb. Rev. Stat. §22-187 50

Rule and Regulations

Sup.Ct.R.14.1(a) 55

35 Fed. Reg. 16,598 (1970) 50

71 Fed. Reg. 10,056 (2006) 9

Other Authorities

ECF Doc. 24, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. July 20, 2006) 51

ECF Doc. 31, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. Oct. 23, 2006) 51

Nat'l Conference of State Legislatures, *Government to Government: Models of*

Cooperation Between States and Tribes (2009), *available at* perma.cc/ay6f-p9ns 52

INTRODUCTION

This Court has repeatedly emphasized that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). As with other legislative actions relinquishing sovereignty, the "congressional purpose" in diminishing a reservation must be "clear and plain." *South Dakota v. Yankton Sioux*, 522 U.S. 329, 343 (1998). To discern the congressional intent behind the Act of Congress alleged to work the diminishment, three factors are relevant: (1) the text of the relevant statute, which in this context, like every other, is the "most probative evidence" of congressional intent; (2) the events surrounding that statute's enactment (*i.e.*, the legislative history); and, (3) to "a lesser extent," post-enactment events and demographic trends. *Solem*, 465 U.S. at 470-72. The question in this case is whether *Congress*—and not the State of Nebraska, the Village of Pender, or Pender residents—diminished the boundaries of the Omaha Reservation by passing the Act of August 7, 1882, ch.434, 22 Stat. 341, *reprinted at* Pet.App.82-88 ("1882 Act").

Applying *Solem*'s three-part test to the extensive evidentiary record in this case, the Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit all held that the 1882 Act did not diminish the Omaha Reservation. Absolutely nothing in the text of the 1882 Act supports a finding of diminishment, let alone reflects a "clear and plain" purpose to diminish. Indeed, while earlier treaties involving the Omaha used the classic formulation for diminishment, the 1882 Act uses the classic

formulation for statutes that permit settlement without diminishment and closely resembles statutes that this Court has already found *insufficient* to diminish a reservation. As the Eighth Circuit observed, "notably absent from [the 1882 Act's] language is any explicit reference to 'cession' combined with 'sum certain' payment, both of which have been found 'precisely suited to terminating reservation status.'" Pet.App.5. The courts below also found that the 1882 Act's legislative history reinforced the text and certainly contained no "unequivocal" indication of Congress' intent to diminish. *Yankton*, 522 U.S. at 351.

Since the ultimate question is whether the 1882 Act of Congress, and not subsequent events, diminished the Reservation, the clarity of the text and legislative history should be the end of the matter. Nevertheless, the courts below also dutifully considered whether any post-enactment evidence shed light on Congress' intent in 1882. Several subsequent statutes passed by Congress regarding the Omaha Reservation "suggest[ed] that the opened area remained a part of the reservation." Pet.App.71. Surely, to the extent any post-enactment developments are probative of the 1882 Congress' intent, it is these subsequent acts of Congress itself. The courts also considered post-enactment evidence concerning the actions of others—such as state officials and mapmakers—and found it "mixed." Pet.App.72, 76. The courts below thus unanimously concluded that there was little evidence, much less "substantial and compelling evidence," *Solem*, 465 U.S. at 472, that Congress diminished the Omaha Reservation in 1882.

Despite a Petition that promised engagement on broader legal questions, Petitioners' brief is confined to disputing the factual and legal determinations of all four federal judges to consider this factbound question below. Having conceded the all-important first *Solem* factor in the courts below, Petitioners relegate discussion of the text to page 47 of a 52-page brief, preferring instead to cherry-pick snippets of post-enactment history and demographic trends. This Court should reject Petitioners' ad hoc and unworkable approach to diminishment, which is flatly inconsistent with basic principles of statutory interpretation and general norms against the inadvertent displacement of sovereign authority. Unless the background principle that courts are to "resolve any ambiguities in favor of the Indians," *Yankton*, 522 U.S. at 344, is to be replaced with one that ordinary rules of statutory interpretation and sovereign authority do not apply to protect Tribes, this Court should affirm.

STATEMENT OF THE CASE

A. Background on Statutory Diminishment of Indian Reservations

1. "In the latter half of the nineteenth century, large sections of the Western States and Territories were set aside for Indian reservations." *Solem*, 465 U.S. at 466. But as the century progressed, many Indian communities, including the Omaha, "developed an increasing need for cash and direct assistance." *DeCoteau v. Dist. Cty. Court*, 420 U.S. 425, 431 (1975); *see* J.A.883-84.

In response to these financial pressures, many tribes, including the Omaha, agreed in treaties to

"cede" discrete sections of their lands to the United States for fixed sums of money that would support ongoing tribal needs. This "cession," or "relinquishment," of tribal lands is commonly referred to as "diminishment." Diminishment occurs when a statute "freed [Indian] land of its reservation status." *Hagen v. Utah*, 510 U.S. 399, 409 (1994). When diminishment occurs, "the States have jurisdiction over unallotted opened lands." *Solem*, 465 U.S. at 467 But diminishment does not occur when the relevant treaty or statute "simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Yankton*, 522 U.S. at 343.

In the last two decades of the nineteenth century, Congress began to shift its approach toward Indian lands. Instead of requiring tribes to give up entire swaths of their reservations for a sum-certain, Congress began to "allot" certain parcels of reservation land to Indians and then sell the remaining "surplus" lands to settlers. For example, in the early 1880s, Congress enacted several statutes that allotted land to tribal members and provided for non-Indian settlement on "surplus" lands on the reservations. *See, e.g.*, Act of June 15, 1880, 21 Stat. 199. And in 1887, Congress generalized this approach by passing the General Allotment Act ("Dawes Act"), 24 Stat. 388 (1887), which was its most significant allotment effort. The Dawes Act "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers, with the proceeds of these sales being dedicated to the Indians' benefit." *DeCoteau*, 420 U.S. at 432.

2. The "modern legacy" of the surplus land acts has been "a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership." *Solem*, 465 U.S. at 467. In cases spanning more than a half-century, this Court has articulated "a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 470.

The "first and governing principle" of diminishment is that "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* Thus, "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom *by Congress*." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux v. Kneip*, 430 U.S. 584, 586-87 (1977).

The "touchstone" in the diminishment analysis is "congressional purpose," and a purpose to diminish must be "clear and plain." *Yankton*, 522 U.S. at 343. Consistent with that demand for a "clear and plain" purpose to find diminishment, courts must begin with a "presumption that Congress did not intend to diminish the Reservation." *Solem*, 465 U.S. at 481. That presumption may then be overcome only by

"substantial and compelling evidence of a congressional intention to diminish." *Id.* at 472.

This Court has identified three factors that shed light on congressional intent. First, the "most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 411. Second, courts should "consider[] 'the historical context surrounding the passage of the surplus land Acts.'" *Id.* Finally, "to a lesser extent," courts should examine "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton*, 522 U.S. at 344. Throughout this inquiry, courts are to "resolve any ambiguities in favor of the Indians, and ... not lightly find diminishment." *Id.*

B. History of the Omaha Reservation and the 1882 Act

In the early 1800s, the Omaha Tribe exercised sovereign dominion over large sections of land in present-day eastern Nebraska. J.A.878. As the nineteenth century progressed, the Tribe faced serious financial difficulties and threats from neighboring tribes. J.A.883-84. Desperate for additional funds and seeking the federal government's protection, by the early 1850s, the Tribe wished to sell large portions of its land and cede control over those lands in exchange for a reservation over which the Tribe could maintain sovereign control. J.A.883-85.

In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the Tribe's "future home." J.A.1020. Using the classic language of diminishment, the Tribe agreed to "cede" to the United States "all claims" to the remaining

portion of its lands in exchange for a fixed sum of $840,000. J.A.1020-23. The Omaha "forever relinquish[ed] all right and title to the country south of" the specified boundary. J.A.1020. The remaining 300,000 acres of land in northeast Nebraska, which indisputably includes present-day Pender, were designated as the Omaha Indian Reservation.

In 1865, the Omaha again agreed to "cede, sell, and convey" to the United States another 98,000 acres in the northern part of the Reservation, J.A.1015, so that the federal government could create a reservation for the Winnebago Tribe, which had been displaced from its traditional lands in Wisconsin, J.A.1018; J.A.892. In exchange for its land, the Omaha Tribe received the fixed sum of $50,000 and certain other promises from the federal government. J.A.1015-16. Pender is not located in the 98,000-acre tract that was sold in 1865.

In 1872, Congress authorized the Secretary of the Interior to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation. *See* J.A.631-32. The proceeds from any sales would be deposited into the U.S. Treasury for the Omaha's benefit. J.A.632. Unlike the 1854 and 1865 Treaties, the 1872 Act did not include any language suggesting that the Omaha had agreed to "cede" the land to the United States for a sum-certain. The 1872 Act was unsuccessful, resulting in the sale of only 300 acres.

Because the 1872 Act was unsuccessful, Congress made another attempt several years later to authorize the sale of lands on the western portion of what Congress recognized remained the Omaha Reservation despite the 1872 Act. In 1882, Congress

once again authorized the Secretary of the Interior to survey, appraise, and sell roughly 50,000 acres on the western side of the Reservation. Pet.App.82. The area opened up for allotment was west of a recently established railroad right-of-way granted by the Tribe. The reaction to the 1882 Act was far more enthusiastic than to the 1872 Act; the 1882 Act resulted in the sale of large portions of the 50,000 acres on the western side of the Reservation.

Although the reaction was different, the text of the 1882 Act was broadly similar to the 1872 Act (which Petitioners never allege to have diminished the Reservation). Under both statutes, the proceeds from any land sales would be deposited into the U.S. Treasury for the Tribe's benefit. And both the 1872 and 1882 Acts—unlike the 1854 and 1865 Treaties—did not include any language suggesting that the Tribe had agreed to "cede" or "relinquish" land to the United States for a sum-certain.

There were, however, two key differences between the 1872 and 1882 Acts, both of which make it less plausible that the 1882 Act diminished the Omaha Reservation. First, the 1882 Act did not contain language from the 1872 Act stating that the land was being "separated from the remaining portion of said reservation." J.A.631. Second, the Omaha Tribe had the right to select allotments in the 50,000-acre opened area, and some tribal members did just that, a clear indication that the land remained part of the Reservation.

C. The Omaha Tribe's Beverage Control Ordinance and Petitioners' Complaint

Congress has authorized tribes to permit liquor transactions in Indian country only if those tribes enact an ordinance that is certified by the Secretary of the Interior, published in the Federal Register, and conforms to "the laws of the State in which" the transaction occurs. 18 U.S.C. §1161. Section 1161, which replaced a blanket federal prohibition on liquor transactions in Indian country, gives joint authority to states and tribes to regulate alcohol sales on reservations. *See Rice v. Rehner*, 463 U.S. 713, 726 (1983).

This case arises out of the Omaha Tribe's efforts to enforce its Beverage Control Ordinance and impose a 10% tax on the sale of alcohol from any licensee on tribal land. Pet.App.16. The Omaha enacted the ordinance in 2004, and the Secretary of the Interior approved it in 2006. *See* 71 Fed. Reg. 10,056 (2006). After the Omaha attempted to enforce the Beverage Control Ordinance against several businesses and clubs that sell alcohol in Pender, the Individual Petitioners—owners or agents of those establishments—brought this suit against the members of the Omaha Tribal Council. The Individual Petitioners sought prospective injunctive relief barring the Tribe from enforcing the Ordinance against them.

On October 4, 2007, the district court stayed the original proceeding so that Petitioners could exhaust their remedies in Omaha Tribal Court. Pet.App.18-19. The Omaha Tribal Court determined on February 4, 2013 that Congress did not "intend[] to diminish the

boundaries of the Omaha Indian Reservation" in the 1882 Act. J.A.137

The case then returned to federal court, and the State of Nebraska intervened, requesting a sweeping permanent injunction prohibiting the Omaha Tribe from asserting jurisdiction within any of the 50,157 acres of Thurston County west of the railroad right-of-way. The United States also intervened, arguing that the 1882 Act did not diminish the Omaha Reservation.

D. The District Court's Opinion

On February 13, 2014, the district court granted summary judgment to Respondents, holding based on an expansive factual record that Petitioners failed to show that Congress clearly intended to diminish the Omaha Reservation through the 1882 Act. Pet.App.77

1. Petitioners conceded below that "the most probative factor to be examined in a diminishment inquiry—statutory language—does not work in their favor." Pet.App.56; *see* D.Ct.Dkt.118, at 41 (conceding that "the express language of the 1882 Act does not incorporate terms which the [Supreme] Court has previously determined to be clear evidence of Congressional intent to diminish").

Despite that concession, the district court carefully examined the text of the 1882 Act. While recognizing that this Court has "never required any particular form of words before finding diminishment," Pet.App.56, the district court noted that the 1882 Act contained *none* of the telltale indicia of diminishment. For example, the Act did "not provide for cession, relinquishment, conveyance, or surrender of all rights, title, or interest to the Omaha

Tribe's land in exchange for a specific sum of money," nor did it "restore lands to the public domain" or "require the Tribe to vacate their reservation land." Pet.App.57 Instead, the 1882 Act simply provided for the survey. appraisal, and sale of lands for settlement, and proceeds from any sales were placed in trust for the Tribe's benefit. *Id.* The 1882 Act allowed Tribe members to select allotments both east and west of the railroad right-of-way, "suggesting that Congress intended the land west of the right-of-way to remain part of the Omaha Reservation." *Id.*

The district court found the textual differences between the 1882 Act and the 1854 and 1865 Omaha Treaties "particularly illuminating." Pet.App.58. In the 1854 and 1865 Treaties—unlike the 1882 Act—the Omaha expressly agreed to "cede, sell, and convey" land to the United States and "relinquish ... all claims" in exchange for a sum-certain. J.A.1015, 1020-21. These differences in statutory language "demonstrat[ed] that both Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so." Pet.App.58.

2. The court next turned to the 1882 Act's legislative history and surrounding circumstances, noting that evidence of diminishment derived from those sources must be "unequivocal." Pet.App.62. The district court found the legislative history to be far from "unequivocal." As the court explained, "the only thing that can be said with certainty is that Congress understood that the stated purpose of the legislation at issue was 'to sell this land and get it into cultivation, and the object of the Indians is to get the money and have it put in trust for them here in

Washington where they can draw their interest.'" Pet.App.63.

Petitioners had cited assorted statements from the 1870s and early 1880s suggesting a desire to "separate" the 50,000 acres of land west of the right-of-way. But the district court found those references unpersuasive because "if use of the word 'separate' ... [has] any legal relevance, then equally significant is Congress's decision to *remove* the word ... from the 1882 Act at issue here." Pet.App.67 (emphasis added). Nor was the court persuaded by two "isolated statements" by the Commissioner of Indian Affairs, who (nearly a decade before the 1882 Act was enacted) had referred to "diminishing these reservations" and a "diminished reserve." *Id.*, *see* J.A.194, 360-61, 504, 625. The district court concluded that these statements "carry little weight" because "even direct, contemporaneous congressional language 'scattered through the legislative history' referring to 'reduced reservation[s]' or 'reservations as diminished' is ambiguous for purposes of diminishment analysis." Pet.App.67 (quoting *Solem*, 465 U.S. at 478).

The district court was thus unable to conclude that Congress "clearly contemplated" that the Reservation would be diminished by the 1882 Act. Pet.App.65. The court found no "specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries or whether the Act would transfer ... tribal sovereignty." *Id.* Accordingly, the court determined, "[t]he legislative history leading up to the passage of the 1882 Act is insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act

would diminish" the Reservation, "as opposed to merely authorize the sale of reservation land to non-Indian settlers for the Omaha Tribe's benefit...." *Id.*

3. This Court has held that "[w]hen both an act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472. The text and legislative history alone thus provided ample basis to reject Petitioners' claims. Nevertheless, because "courts are to consider all three [*Solem*] factors," Pet.App.68-69, the district court also analyzed post-enactment history and demographic trends, *see* Pet.App.69-76.

The court began with subsequent congressional enactments that extended the payment period for settlers who purchased lands on the Reservation. These extensions, which Congress passed in 1885, 1886, 1888, 1890, and 1894, "continued to reference the disputed area as the 'Omaha Indian Reservation' and 'Omaha lands,'" which "suggest[ed] that the opened area remained a part of the reservation." Pet.App.35, 70-71. Moreover, the 1888 Act "hint[ed] that diminishment did not occur" because "the United States merely continued to act as trustee for the Tribe so the Tribe gained the financial benefit of the sale." Pet.App.71-72. Congress also conditioned some extensions on the Tribe's consent, further "suggesting the continued reservation status of the disputed lands." Pet.App.72.

Turning to other post-enactment evidence, the district court noted that "the Omaha Reservation has

been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Id.* This "mixed record," the court determined, "fails to reveal a consistent or dominant approach to the territory at issue[,] is 'of limited interpretive value,' carries 'little force,' and cannot be considered dispositive of the question whether Congress intended to diminish the Omaha Reservation in the 1882 Act." *Id.*

The district court also concluded that the "'mixed' evidence regarding the demographics of the area west of the right-of-way is not dispositive." Pet.App.76. The court recognized that demographic trends are the "least compelling" consideration under *Solem* because "'[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the "Indian character" of the reservation, yet ... not every surplus land Act diminished the affected reservation.'" Pet.App.74 (quoting *Yankton*, 522 U.S. at 356). And the court was not persuaded that demographic trends trumped the absence of other evidence of diminishment because the parties "agree[d] that 'many' members of the Omaha Tribe have regularly visited, resided in, and conducted business in Pender." Pet.App.75. This "[c]ommunity involvement" by the Tribe's members "suggests their understanding that Pender sits within reservation boundaries." *Id.*

E. Eighth Circuit's Opinion

The Eighth Circuit unanimously affirmed in an opinion by Judge Beam joined by Judges Loken and Colloton. The court observed that "notably absent" from the text of the 1882 Act is "any explicit reference to 'cession' combined with 'sum certain' payment, both

of which have been found 'precisely suited to terminating reservation status.'" Pet.App.5 (quoting *Yankton*, 522 U.S. at 344). The court also agreed with the district court that the text of the 1882 Act "indicates that the United States intended to act as the Omaha Tribe's sales agent ... with the proceeds held in trust in the United States Treasury for the benefit of members of the Omaha Tribe." Pet.App.6.

Turning to the second and third *Solem* factors, and after de novo review of the record, the Eighth Circuit concluded that "the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts" established by this Court. *Id.* The court added that the district court "carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus." Pet.App.7

The Eighth Circuit subsequently denied Petitioners' request for rehearing en banc. Not a single judge voted to grant rehearing.

SUMMARY OF ARGUMENT

This Court has repeatedly held that "only Congress can divest a reservation of its land and diminish its boundaries," *Solem*, 465 U.S. at 470, and that courts should accordingly not find diminishment absent "clear and plain" evidence of congressional intent to diminish, *Yankton*, 522 U.S. at 343. The Omaha Tribal Court, a federal district court, and a unanimous panel of the Eighth Circuit concluded based on an extensive evidentiary record that the

demanding standard for diminishment is not satisfied here because there is no clear evidence that Congress intended to diminish the Omaha Reservation by passing the 1882 Act. The text and context of the 1882 Act strongly suggest that Congress did *not* intend to diminish the Reservation, and the post-enactment history is "mixed." Relying on such "mixed" post-enactment history to find a clear purpose to diminish in the face of the statutory text would disregard ordinary rules of statutory construction and sovereignty Petitioners' diminishment claim should thus be rejected under a straightforward application of existing law.

I. This Court's interpretation of the 1882 Act should be guided by three fundamental principles. First, when interpreting a statute, this Court "begin[s], as always, with the text." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009). Second, absent clear indication from Congress, this Court will not dispossess any sovereign of its authority or territory. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). Third, when interpreting statutes involving tribes, this Court will "resolve any ambiguities in favor of the Indians." *Yankton*, 522 U.S. at 344. All three of these bedrock interpretive principles cut against a finding of diminishment, but only the first two are necessary to reject Petitioners' extraordinary request for diminishment without textual support. Indeed, to find diminishment here would require the Court to invert the Indian canons and disregard principles of statutory construction and sovereign authority applicable in every other context. There is simply no

basis for finding clear indication of congressional intent to diminish a Tribe's sovereign territory based on "post-enactment legislative history" that in other contexts would be dismissed as an oxymoron.

In the diminishment analysis—as with any question of statutory interpretation—the statutory text is the "most probative evidence" of congressional intent. *Solem*, 465 U.S. at 470. The text of the 1882 Act contains *none* of the indicia of a congressional intent to diminish that this Court has recognized in previous cases. For example, the Act does not mention "cession," "relinquishment," or "surrender" of the lands, nor does it indicate any intent to restore the Reservation to the "public domain" or provide a sum-certain directly from the government in exchange for the relinquishment of the Reservation. Instead, the 1882 Act's operative statutory language—which merely authorizes the United States to serve as the Omaha's "sales agent" for certain lands—is virtually identical to language that this Court has found to be *insufficient* to support a finding of diminishment. *Solem*, 465 U.S. at 473. And the 1882 Act specifically provided for members of the Omaha Tribe to claim allotments on the western portion of the land, which is flatly inconsistent with congressional intent to diminish the Reservation.

Congress' intent not to diminish the Omaha Reservation is underscored by the contrast between the 1882 Act and the text of earlier treaties and statutes involving that very same Reservation. The 1854 and 1865 Treaties used the classic language of diminishment by specifically indicating that the Omaha would "cede" portions of their land for a sum-

certain. The text of the 1882 Act, by contrast, employs the classic language of legislation that opens up reservation land for settlement without diminishing the reservation. Both Congress and the Omaha plainly knew the difference. What is more, the 1872 Act—which even Petitioners acknowledge did not diminish the Reservation—was largely similar to the 1882 Act, and the two principal differences contradict an intent to diminish. Thus, if the 1872 Act did not diminish the Reservation, it follows *a fortiori* that the 1882 Act did not.

Given the overwhelming textual evidence against a finding of diminishment, it is no surprise that Petitioners conceded the first *Solem* factor below and give the statutory text only a passing mention at the very end of their brief. Thus, the "most probative evidence" of congressional intent—intent that must be clear, lest sovereignty be inadvertently surrendered—cuts firmly in favor of finding that the Omaha Reservation remains intact.

II. Legislative history and surrounding circumstances are relevant to the diminishment inquiry, but such evidence must be "unequivocal" to support a finding of diminishment. *Yankton*, 522 U.S. at 351. The circumstances leading to the 1882 Act's passage confirm what the plain language of the statute makes clear: the 1882 Act was not intended to diminish the Reservation. None of the scraps of legislative history that Petitioners highlight comes close to supplying "unequivocal" evidence of diminishment or countering the clarity of the text and historical context. Indeed, the premise of Petitioners' first question presented is that the legislative history

is, at best, "ambiguous." Pet.Br.i. Ambiguous evidence, by definition, is neither "unequivocal" nor "clear and plain."

Taken together, the evidence on the first two *Solem* factors here is sufficient to support the judgment below. "When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Solem*, 465 U.S. at 472. Moreover, to the extent this Court looks for evidence that Congress' intent to diminish is "clear and plain," post-enactment developments do not suffice to provide a clear indication absent in both the text and traditional legislative history.

III. Even though there was no clear evidence of diminishment in either the text or legislative history of the 1882 Act, the courts below dutifully considered whether any *post-enactment* evidence shed meaningful light on Congress' intent. The district court found that the "mixed record" fell far short of the "substantial and compelling evidence" needed to demonstrate intent to diminish, and the Eighth Circuit unanimously affirmed based on its independent review of the record.

Petitioners' near-exclusive reliance on post-enactment history is at war with the "two-court rule" and this Court's half-century-old "fairly clean analytical structure" for assessing diminishment. *Id.* at 470. This Court's diminishment cases suggest only a supporting role for such evidence. *Id.* at 471. And outside this context, this Court's cases suggest such

"evidence" should play no role at all: "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*, 562 U.S. 223, 242 (2011). Whatever the role for such evidence when the first two *Solem* factors point in opposite directions, such evidence alone should not be the basis for finding diminishment, lest both the requirement that Congress' intent be "clear and plain" and this Court's repeated warning to "resolve any ambiguities in favor of the Indians" be turned entirely upside down. *Yankton*, 522 U.S. at 343-44.

To the extent that any post-enactment evidence could materially aid an inquiry into *Congress'* intent, it would come from congressional actions roughly contemporaneous with the 1882 Act. Several statutes enacted shortly after the 1882 Act "suggest that the opened area remained a part of the reservation." Pet.App.71. The remaining post-enactment evidence, mainly emanating from non-congressional actors, is "mixed," as the lower courts correctly found. Pet.App.72, 76. At most, Petitioners cherry-pick snippets of post-enactment history and demographic trends that support their position. But Petitioners simply ignore substantial post-enactment evidence showing that both the United States and Nebraska continued to treat the disputed area as part of the Reservation. The finding of two lower courts that the post-enactment historical record was "mixed" is well-supported by the evidence and should be entitled to great deference on appeal. That mixed record cannot possibly negate Congress' express enactments defining the Reservation's boundaries.

IV. Petitioners' position—which focuses on factors far afield from congressional intent—also risks producing harmful consequences to tribes and their neighboring communities. The ad hoc diminishment inquiry Petitioners advocate encroaches on Congress' plenary power to define the boundaries of Indian reservations. Moreover, finding diminishment based on demographic trends and the sharing of jurisdiction among tribal, state, and local authorities undermines any potential for cooperation between tribes and non-Indian communities, and risks destabilizing the status of Indian lands. Nor are there judicially discernible and manageable standards to govern this inherently ad hoc inquiry. It is anyone's guess when an amorphous array of factors wholly divorced from congressional intent will "de facto diminish" congressionally-established reservation boundaries. A textually-focused inquiry that turns on what is actually in the statute books avoids that guessing game.

Petitioners drastically overstate the impact of a finding of non-diminishment. Multiple other doctrines governing Indians tribes' authority over non-Indians will fully protect the rights of non-Indians living on the Omaha Reservation. *See, e.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981). No matter how the Court decides this case or other diminishment cases, there will still be many non-Indians on tribal land who will be protected by such doctrines. In light of these well-established doctrinal tools to protect the rights of non-Indians, Petitioners' and amici's poorly-defined and inaccurate "parade of horribles" rings hollow and provides no compelling

basis to dispense with rules of statutory construction that hold sway in all other contexts or to override Congress' judgments about the Omaha Reservation's boundaries.

ARGUMENT

I. The Text Of The 1882 Act Makes Clear That Congress Did Not Intend To Diminish The Omaha Reservation.

The first *Solem* factor is "the statutory language used to open the Indian lands." *Hagen*, 510 U.S. at 411. As with every other question of statutory interpretation, the statutory text is the "most probative evidence" of congressional intent. *Id.*

The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of [the Omaha] reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company" in 1880. Pet.App.82. The Act also authorized the appraisal of the lands west of the right-of-way. *Id.*

Before any land was sold, however, the 1882 Act permitted Omaha Tribe members to select allotments in any part of the Omaha Reservation. Specifically, the Act provided that Tribe members "may, if they shall so elect, select the land which shall be allotted to them in severalty *in any part of said reservation either east or west of said right of way.*" Pet.App.88 (emphasis added). "[U]nallotted lands" west of the railroad right-of-way were then made available for purchase and settlement by anyone, with the sale proceeds "placed to the credit of said Indians in the

Treasury of the United States." Pet.App.82-84. That is not the language of diminishment. As Petitioners correctly conceded below, absolutely nothing in this statutory text reflects a clear congressional intent to diminish the Omaha Reservation.

A. Interpretation of the 1882 Act Is Guided by Three Bedrock Principles That This Court Has Repeatedly Reaffirmed.

Three fundamental principles should guide this Court's interpretation of the 1882 Act.

First, the text of a statute is, by far, the best evidence of the enacting Congress' intent. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). It is a wholly unremarkable proposition, embraced in multitudinous contexts and in opinions of every member of the Court, that the starting point—and, in most cases, ending point—of statutory interpretation is the statutory text. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 572 (2009); *Hartford Underwriters Ins. v. Union Planters Bank*, 530 U.S. 1, 6 (2000); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Germain*, 503 U.S. at 253-54; *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Kasten v. Saint-Gobain Performance Plastics*, 563 U.S. 1, 7 (2011); *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006); *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013); *Caraco Pharm. v. Novo Nordisk*, 132 S. Ct. 1670, 1680 (2012).

Second, this Court will not lightly infer that Congress has dispossessed any sovereign of its territory or authority. *See, e.g.*, *Hibbs*, 538 U.S. at 726.

This is not some principle distinct to the tribal cases. Rather, this Court's cases are replete with requirements that Congress use clear language before abrogating sovereign immunity or imposing obligations on sovereigns. *See, e.g., id.* (Congress may not abrogate state sovereign immunity unless its intention is "unmistakably clear"); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). This Court recently reaffirmed this principle more generally in the tribal context, *see Bay Mills*, 134 S. Ct. at 2031-32, and the proposition certainly applies in the diminishment context, *see Yankton*, 522 U.S. at 344. In short, there is no "adverse possession" or inadvertent loss of sovereign authority or territory. If Congress intends to divest a sovereign of its land or authority, it must do so clearly.

Third, in the context of statutes affecting Indian tribes, this Court has applied "a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cty. of Yakima v. Confederated Tribes of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). This Court has reaffirmed that principle in diminishment cases. *See Yankton*, 522 U.S. at 344 ("Throughout this inquiry, 'we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment.'"). If this canon means anything, it must mean that courts cannot use especially *disfavored* methods of statutory interpretation—such as a reliance on post-enactment evidence as an indicium of congressional intent, *see, e.g., Bruesewitz*,

562 U.S. at 242—to dispossess an Indian tribe of land that Congress expressly conferred.

B. The 1882 Act Contains No Telltale Signs of Congressional Intent to Diminish.

This Court has identified several telltale signs of diminishment. The first sign is language that indicates cession or relinquishment of, or the surrender of all rights and interests in, reservation land. *See Yankton*, 522 U.S. at 344 (diminishment found when tribe agreed to "cede, sell, relinquish, and convey" its "claim, right, title, and interest in and to" lands); *Rosebud*, 430 U.S. at 597 (diminishment found when agreement required tribe to "cede, surrender, grant, and convey" claims and interests in land). This Court has also found diminishment when a statute provides a tribe with a sum-certain from the federal government in exchange for relinquishment of land. *See DeCoteau*, 420 U.S. at 448. The combination of a reference to cession, relinquishment, or surrender and the provision of a sum-certain is the classic language of diminishment and is "'precisely suited' to terminating reservation status." *Yankton*, 522 U.S. at 344. Finally, this Court has found congressional intent to diminish based on statutory text indicating that tribal land will be "restored to the public domain." *Hagen*, 510 U.S. at 412.

As the courts below unanimously recognized, the 1882 Act contains *none* of these telltale signs of diminishment. J.A.93-100; Pet.App.57; Pet.App.5-6. There is no reference to the Tribe's cession or relinquishment of land, nor is there any suggestion that the Omaha were surrendering all claims, rights, and interests in the western portion of the

Reservation. The 1882 Act also does not provide the Tribe with a sum-certain for relinquishment of land, nor does it specify any return of the land west of the right-of-way to the public domain. Although Congress need not use any "magic words" to effect a diminishment, the absence of *any* of the classic words of diminishment in the text of the 1882 Act is powerful evidence that Congress did not intend the statute to have that effect.

C. The 1882 Act Closely Resembles Other Statutes That Did Not Diminish Reservations.

This Court has also explained what types of statutory language are *insufficient* to show diminishment. Most important, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-87 That is, the opening of reservation land to settlement via sales of allotted parcels does not amount to a cessation of sovereignty over that land. *Id.* This Court has also held that language authorizing the Secretary of the Interior to "sell and dispose" of land is insufficient to indicate congressional intent to diminish. *Solem*, 465 U.S. at 472-73. And another indication of congressional intent not to diminish is provision for the deposit of proceeds resulting from a land sale "in the Treasury of the United States, to the credit of the" tribes benefitting from the sale of land. *Id.* at 473.

The 1882 Act merely authorized the Secretary of the Interior to survey, appraise, and eventually sell portions of the Omaha Tribe's lands. Pet.App.82. The

Act also provided for the creation of Indian accounts where proceeds would be held in trust for the Tribe's benefit. Pet.App.84.

Those provisions are essentially identical to the statutory text that this Court found did not give rise to diminishment in *Solem*. This Court held that the "reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." 465 U.S. at 473. That is precisely what Congress did in the 1882 Act. As in *Solem*, the language of the 1882 Act evinces congressional intent to have the Secretary of the Interior act as the Tribe's sales agent, not to diminish the Reservation.

Moreover, in the 1882 Act, Congress provided that Indians entitled to allotments could choose their parcels "*in any part of said reservation either east or west of said right of way.*" Pet.App.88 (emphasis added); 22 Stat. at 341. And members of the Tribe, in fact, selected allotments west of the right-of-way. Pet.App.34. Even putting aside the fact that allotment "is completely consistent with continued reservation status," *Mattz v. Arnett*, 412 U.S. 481, 497 (1973), these allotments to Indians "either east or west of said right of way" plainly suggest that the land west of the right-of-way remained every bit as much a part of the Reservation as the land east of the right-of-way, and that Congress never intended to diminish the Reservation.

D. Congress Knew Precisely How to Diminish the Omaha Reservation Yet Chose Not to Do So in the 1882 Act.

This Court has often compared the text of various congressional acts to determine whether a particular act diminished a reservation. *See, e.g.*, *Seymour v. Wash. State Penitentiary*, 368 U.S. 351, 355 (1962) (considering "important differences" between statute at issue and earlier act). Such a comparison often shows that "Congress was fully aware of the means by which termination [of reservation status] could be effected." *Mattz*, 412 U.S. at 504.

Just so here. Both the 1854 and 1865 Treaties demonstrate that Congress (and the Omaha) unquestionably knew how to diminish the Omaha Reservation when it wanted to do so. Those two treaties use the classic language of cession to indicate diminishment of the old boundaries of the Reservation. *See* J.A.1020 ("The Omaha Indians *cede to the United States* ... their lands ..., and *forever relinquish all right and title*...." (emphasis added)); J.A.1015 ("The Omaha tribe of Indians do hereby cede, sell, and convey to the United States" certain lands and "will vacate and give possession of the lands ceded by this treaty immediately after its ratification."). They likewise provide for lump-sum payments from the United States in exchange for the ceding of lands. *See* J.A.1022; J.A.1015-16.

By contrast, the 1882 Act contains no language indicating cession, relinquishment, surrender, or lump-sum payment. It would be odd to say the least if Congress used the classic language of diminishment in 1854 and 1865, yet used wholly dissimilar language

to accomplish the exact same end as to the exact same reservation a decade or two later. *See Mattz*, 412 U.S. at 504; *Duncan Energy v. Three Affiliated Tribes*, 27 F.3d 1294, 1297 (8th Cir. 1994) (rejecting that "Congress intended the same meanings for the vastly different language employed in these two documents affecting the Tribe"). If words are to have meaning, then the use of vastly different textual approaches in the 1872 and 1882 Acts should produce different effects than the 1854 and 1865 Treaties.

A comparison of the text of the 1872 Act and 1882 Act also flatly refutes any finding of diminishment. Critically, no party contends that the 1872 Act worked a diminishment of the Reservation. Indeed, the text of the 1882 Act, which quite plainly refers to a "reservation" extending "east or west of said right of way" precludes any contention that the 1872 Act diminished the Reservation. But the concession concerning the 1872 Act is telling because the language employed in the two statutes is similar (and quite different from that used in the earlier Treaties).

Moreover, the two principal textual differences between the statutes make it even less plausible that the 1882 Act, but not the 1872 Act, diminished the Reservation. First, the 1872 Act contained a phrase suggesting that the western portion of the Reservation was "to be separated from the remaining portion of said reservation." J.A.631. But Congress removed that phrase in the 1882 Act. If use of this phrase "in the 1872 Act [has] any legal relevance, then equally significant is Congress's decision to remove the ... phrase from the 1882 Act." Pet.App.67 Second, the 1872 Act did not provide for Indian allotments on the

land that was being put up for sale, whereas the 1882 Act did. Thus, if the 1872 Act did not diminish the Omaha Reservation, then the 1882 Act even more clearly failed to do so.

E. Petitioners' Brief Discussion of the Statutory Text Does Not Support a Finding of Diminishment.

Petitioners finally get around to examining the single most important consideration in any statutory interpretation case on page 47 of their 52-page brief. *Cf. Hawaii*, 556 U.S. at 173 (This Court "begin[s], as always, with the text of the statute."). When they belatedly address the statutory text, Petitioners readily acknowledge that the 1882 Act does "not explicitly address[]" diminishment of the Omaha Reservation. Pet.Br.47; *see* Pet.App.56 (conceding below that "the most probative factor to be examined in a diminishment inquiry—statutory language—does not work in their favor").

Left with nothing in the statute's text to support their position, Petitioners bravely contend that Congress did not include specific language regarding diminishment because Congress anticipated that *all* reservations would eventually cease to exist. Pet.Br.46-47. But this Court has already rejected that exact argument, noting that it has "never been willing to extrapolate ... a specific congressional purpose of diminishing reservations with the passage of every surplus land Act" simply because "Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process." *Solem*, 465 U.S. at 468-69.

Petitioners cite two recent circuit court cases that supposedly found diminishment in the absence of specific words suggesting diminishment. But those two cases are readily distinguishable. In *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009), the Seventh Circuit found diminishment in a statute that did not include "hallmark diminishment language," but plainly offered the tribe new land—effectively "a new reservation for the Tribe from which tribal members could select their allotments"—in exchange for ceding its traditional reservation. *Id.* at 662-63. The "clear implication" of this land swap was that "the boundaries of the new reservation were not defined by [any older] treaty, but rather by the Tribe and its acceptance of a new home." *Id.* at 663. Clearly, the statute in *Stockbridge-Munsee* was, in contrast to the 1882 Act here, "more than a run-of-the-mill allotment act," *id.*, and provides Petitioners no comfort.

Petitioners' reliance on *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), which concluded that the 1906 Osage Allotment Act disestablished the Osage Reservation, is equally misplaced. The Tenth Circuit made clear that the 1906 Act was designed to accomplish far more than allotment. "In 1905, the Osage approached Congress to begin negotiating a bill 'to abolish their tribal affairs and to get their lands and money fairly divided, among themselves.'" *Id.* at 1124. No one here contends that the Omaha had any interest in "abolish[ing] their tribal affairs," and disestablishment is not even at issue. The allotment of lands in a portion of a reservation that indisputably would continue to exist is properly evaluated as a run-

of-the-mill allotment act, and not part and parcel of an effort to wind up tribal affairs altogether.

Finally, Petitioners assert that Congress did not need to indicate diminishment in the 1882 Act because the Omaha Tribe was not physically located on the land west of the right-of-way. Pet.Br.49-51. But that argument hardly advances Petitioners' position and ignores Petitioners' burden under this Court's precedents. It is undisputed that the *entire parcel* in question was part of the Omaha Reservation at the time Congress enacted the 1882 Act. The Act itself, with its reference to "said reservation," makes this fact plain. The fact that members of the Omaha Tribe had concentrated their dwellings, as opposed to other activities, on the eastern portion of the Reservation, may explain why the western portion was targeted for allotment. But since the allotment was open to the Omaha "east or west of said right of way" (a right-of-way that was granted by the Omaha as an act of their sovereign authority over the Reservation) and included none of the telltale language of diminishment, the location of the principal Omaha dwellings does not assist Petitioners at all. It certainly does not help them as to the first *Solem* factor, and even more clearly does not carry Petitioners' actual burden, which is to show "clear and plain" evidence of congressional intent to diminish. *Yankton*, 522 U.S. at 343.

II. The 1882 Act's Legislative History And Surrounding Circumstances Indicate Congressional Intent Not To Diminish The Reservation.

This Court has held that "[e]ven in the absence of a clear expression of congressional purpose in the text of a surplus land Act, *unequivocal* evidence derived from the surrounding circumstances may support" a finding of diminishment. *Id.* at 351 (emphasis added); *but cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 287 (1994) (Scalia, J., concurring) ("If it is a 'clear statement' we are seeking, ... [n]o legislative history can [provide] that, of course, but only the text of the statute itself."). But that evidence must truly be "unequivocal" because "legislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil v. Allapattah Servs.*, 545 U.S. 546, 568 (2005). "Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in '"looking over a crowd and picking out your friends."'" *Id.*

This Court has thus made clear that a few isolated snippets of legislative history are insufficient to support a finding of diminishment. *See Solem*, 465 U.S. at 478. Indeed, even direct, contemporaneous language "scattered through the legislative history" referring to "reduced reservation[s]" or "reservations as diminished" is insufficient to give rise to diminishment. *Id.* "Without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands, and in the absence of some clear statement of

congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish...." *Id.* Any other view would be antithetical to this Court's repeated assurance that Congress does not lightly or inadvertently dispossess sovereigns of their territory or authority. Only "clear and plain" evidence will do.

As both courts below recognized, Petitioners' cherry-picked statements from the legislative history of the 1882 Act fall far short of providing such "clear and plain" evidence. Indeed, the premise for Petitioners' first question presented is that the evidence concerning the second *Solem* factor is "ambiguous." Pet.Br.i. Of course, ambiguous evidence is neither "unequivocal" nor "clear and plain," and thus cannot support a finding of diminishment. *Cf. Landgraf*, 511 U.S. at 288 (Scalia, J., concurring) ("The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement.").

A. The Circumstances Surrounding the 1882 Act Strongly Suggest Congressional Intent Not to Diminish.

The historical context leading to the passage of the 1882 Act confirms what the text makes clear: The 1882 Act was never intended to diminish the Omaha Reservation. *See, e.g., Mid-Con Freight Sys. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440, 449 (2005) ("Our reading of the text finds confirmation in historical context.").

The textual differences between the 1854 and 1865 Treaties and the 1872 and 1882 Acts already

highlighted were not accidental. They instead reflect differences in Congress' intent and changes in Congress' treatment of Indian lands. In approving the 1854 and 1865 Treaties, Congress expressly wanted to reduce the size of the Omaha Reservation, not just open it up to settlement. Thus, Congress provided the Omaha a sum-certain from the U.S. Treasury in exchange for large sections of undivided land. In the 1865 Treaty, for example, diminishment was unequivocally intended because the ceded land was to be used to provide reservation land to the Winnebago Tribe, which had been displaced from its native lands in Wisconsin. J.A.1018; J.A.892. The Treaties used the language of cession because that is what Congress wanted to accomplish. Congress was not content with simply allotting land to Indians or settlers, but wanted to transfer sovereignty completely and did so explicitly.

By the 1882 Act's passage, however, Congress' specific intent for the Omaha and its general approach to Indian lands had changed. As to the Omaha specifically, Congress was seeking to open a portion of "said reservation" to settlement, not trying to definitively transfer it to create a homeland for another Tribe. And more generally, by 1882, Congress was less inclined to require cession of large swaths of land in exchange for a sum-certain paid directly from the U.S. Treasury. Instead, Congress began to allot parcels of Indian land to non-Indian settlers with payments from the settlers held in trust for the Tribe, only to the extent such sales took place. Absent an express indication of an intent to diminish, these later acts did not diminish reservations or extinguish sovereignty, but gave Indian tribe members a choice:

they could either select allotments, or sell fee title to their "surplus" lands for use by non-Indian settlers. As a result, under the 1882 Act, the Omaha Tribe transferred title to, *but did not relinquish the reservation status of*, any lands that eventually happened to be sold to non-Indians.

Even apart from its text, discussed above, the 1872 Act provides important *context* for the 1882 Act. Petitioners do not contend that the 1872 Act diminished the Reservation, and for good reason. The 1882 Act opened up for sale virtually the same area as the 1872 Act, and Congress never indicated that it had already diminished the western portion of the Omaha Reservation as a result of the 1872 Act.[1] Rather, both acts permitted settlement to the extent there were successful sales, but neither Act transferred sovereignty or diminished the Reservation.[2]

That reality explains why the 1882 Act still referred to the land west of the right-of-way as part of "said reservation," a decade after the 1872 Act. Indeed, it explains how the all-important right-of-way

---

[1] While both Acts addressed the western portion of the Reservation, the Acts defined the land opened up for settlement differently. *Compare* J.A.631, *with* Pet.App.82. If either Act actually diminished the boundaries of the Omaha Reservation, this differential treatment would be quite surprising. On the other hand, if the Acts simply opened up land for settlement without changing reservation borders or displacing sovereignty, such differences are understandable.

[2] Any attempt to draw a distinction between the 1872 and 1882 Acts based on the relative success of the allotment processes ignores the fact that the "touchstone" of the diminishment inquiry is "*congressional* purpose," not market reaction. *Yankton*, 522 U.S. at 343 (emphasis added).

came to be. In April 1880, the Omaha Tribe agreed to grant the Sioux City and Nebraska Railroad a right-of-way "*through* their reservation." J.A.336 (emphasis added). No one contends that the Tribe's grant of that right-of-way was an ultra vires act of a sovereign displaced by Congress eight years earlier. To the contrary, Petitioners readily acknowledge both that it was the *Omaha Tribe*, and not Nebraska or the United States, that granted that right-of-way. and that the right-of-way ran "*through* the reservation." Pet.Br.4 (emphasis added).

Putting to one side the irony of trying to use that sovereign act of dominion (that facilitated settlement of the West) to delimit the Tribe's sovereignty, that exercise of the Tribe's sovereign authority in 1880 makes plain that the 1872 Act did not diminish the Omaha Reservation, and that the right-of-way ran *through* the Reservation, and did not somehow define the Reservation's outer boundary In light of the indisputable evidence that the 1872 Act did not diminish the Reservation, it strains credulity to think the 1882 Act addressing roughly the same portion of the Reservation and using language that is even less compatible with diminishment, *see supra* Part I.D., dispossessed the Tribe of sovereignty.

B. The 1882 Act's Legislative History Contains Evidence That Congress Did Not Intend to Diminish.

Evidence from the legislative history of the 1882 Act further confirms that Congress did *not* intend to diminish the Omaha Reservation. In particular, Congress made an effort to preserve Indian lands even west of the railroad right-of-way.

During the legislative debate, Senator Henry Dawes acknowledged that "the Omaha Indians have the whole reservation and occupy it under an existing treaty in which it is stipulated that any Indian may go upon any part of the whole reservation and occupy" land. J.A.459. In response to a suggestion that the Omaha would no longer live on the western portion of the Reservation, Senator Dawes added that "[t]here are ... quite a number of [Indians] who have gone onto some part of the reservation and made such locations, and who are entitled under existing treaties to the qualified patent; they have come to Congress praying that Congress will give them the patent." J.A.459-60. Senator Dawes further added that he wanted to "make it perfectly safe and preserve the rights of any Indian who may have located upon this land." J.A.460. Senator James Beck similarly acknowledged that the Omaha "have a right to go upon any part" of the Reservation. *Id.*

While this evidence does not speak definitively to the precise boundaries of the Omaha Reservation, it does underscore that Congress recognized that the Reservation extends east and west of the right-of-way and expressly gave tribal members the option to take land "east or west of said right of way," which cannot be squared with an intent to diminish "said reservation" or draw a new boundary at "said right of way."

C. The Legislative History Cited by Petitioners Does Not Show Clear Congressional Intent to Diminish.

Even though Petitioners bear the burden of proving diminishment by clear evidence, they engage

in the precise "cherry-picking" of isolated pieces of legislative history that this Court has repeatedly deemed insufficient in this and other contexts. *See Solem*, 465 U.S. at 478; *Am. Tobacco v. Patterson*, 456 U.S. 63, 75 (1982) ("The fragments of legislative history cited ... , regardless of how liberally they are construed, do not amount to a clearly expressed legislative intent contrary to the plain language of the statute."); *Ratzlaf*, 510 U.S. at 147-48 ("we do not resort to legislative history to cloud a statutory text that is clear").

For example, Petitioners rely on two statements by the Commissioner of Indian Affairs that refer to "diminishing these reservations" and a "diminished reserve." Those statements of an Executive-Branch official referring to a different Act (the 1872 Act) are not "legislative" history at all, but certainly exhibit all the flaws that give legislative history a bad name. First, and most obviously, the observations of an *Executive-Branch* official are a particularly poor indicium of *congressional* intent. Second, these statements are not even contemporaneous with the 1882 Act, but were made nearly a decade earlier. Third, consistent with that timing, the references pertained to the 1872 Act, not the 1882 Act, and Petitioners have never contended that the 1872 Act diminished the Reservation. And, finally, while Petitioners highlight one sentence from an 1874 report from the Commissioner, the preceding sentence indicates just as clearly that the Reservation contained 192,867 acres, including the 50,000 acres opened to settlement pursuant to the 1872 Act. *See* J.A.504 ("The Omahas are located *on a reservation* in the eastern part of Nebraska, on the Missouri River,

containing 192,867 acres...." (emphasis added)). Thus, while neither legislative, contemporaneous, nor directed at the 1882 Act, the Commissioner's own statements hardly support a finding of diminishment.

None of the other pre-enactment history cited by Petitioners speaks to the *borders* of the Reservation. For example, Petitioners cite legislative history noting that "the white men will occupy up to the railroad on the west," J.A.201, 726, and discussing the amount of space in which the Tribe would be able to farm, J.A.683. Those references might capture what some legislators envisioned would happen if the individual sales pursuant to the 1882 Act were more plentiful than those authorized by the 1872 Act, but they do not address the boundaries of the Reservation or the cessation of tribal sovereignty. The "mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud*, 430 U.S. at 586-87."[3]

Petitioners also argue that it is somehow relevant that the 1882 Act pre-dated the 1887 Dawes Act. Pet.Br.43-46. According to Petitioners, the 1882 Act is not similar to the Dawes Act or subsequent allotment acts that this Court has previously examined in the diminishment context. As Petitioners

---

[3] Petitioners also cite Senator Ingalls' observation that, under the 1882 Act, "[t]he lands that [the Tribe] occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished." J.A.647. But those remarks, too, had nothing to do with the Reservation's boundaries. Senator Ingalls was actually discussing the residual jurisdiction of the federal government to exempt Indians on the Reservation from state taxation.

recognize, the defining feature of post-Dawes Act allotments is that "individual parcels of land were allotted to tribe members with the remaining parcels declared surplus and opened for settlement by, and sale to, non-Indians." Pet.Br.44. Petitioners find it significant that the Dawes Act created a "checkerboard pattern of land ownership," which does not suggest an intent to diminish. *Id.*

But the 1882 Act was precisely the same type of allotment statute.[4] It too provided for allotments to Indians within lands that would be opened up for settlement, thereby creating the possibility of "checkerboard" Indian and non-Indian land ownership within the Omaha Reservation. Pet.App.88. The reality that most Indians subsequently took land relatively near the right-of-way that had been granted "through the reservation" or further east is not legislative history and is properly considered under the third *Solem* factor. Regardless of the pattern of settlement that ensued and whether it resembled a checkerboard or some other gameboard, the 1882 Act allowed allotments to Indians west of the right-of-way and was not materially different from the Dawes Act.

Finally, amicus Citizens Equal Rights Foundation (CERF) breathlessly claims to have found a "key piece of the legislative history" that "was missing" from the record below and "explains the intent of Congress to not only diminish the Omaha Indian reservation but to restore the lands west of the railroad right of way

---

[4] It is no surprise that the 1882 Act closely resembles the later Dawes Act given that Senator Dawes played a meaningful role in the floor debate on the 1882 Act. *See, e.g.*, Pet.App.27.

to the public domain to be sold to bona fide purchasers under the public land laws." CERF.Br.4.

Amici's claim is enough to call into question the whole enterprise of relying on legislative history to provide the kind of "clear and plain" evidence needed to displace sovereignty. After all, it hard to imagine a key piece of the statutory text could go missing. Nor is it obvious that the contours of sovereignty should depend on things not readily discernible from the statute books. But alas, the legislative history that CERF purportedly discovered was in fact before the district court and was specifically examined in the expert report prepared by the Omaha's historical expert. *See* J.A.754.

The reason that the House Report did not "end[] this suit in the federal district court," CERF.Br.22, and does not feature in Petitioners' brief, is not that it was overlooked, but that it does not advance the ball. The Report says nothing about the boundaries of the Reservation. It instead simply discusses how much land would be available for the use and occupancy of the Tribe and how much land would be opened for sale; indeed, the Tribe even had the option of claiming allotments on the lands that were to be sold. As noted, the mere sale of land to settlers does not diminish a reservation, *see Rosebud*, 430 U.S. at 586-87, and this legislative history is equally consistent with a congressional intent to sell lands *on the Omaha Reservation*.

III. Post-Enactment History And Demographic Trends Do Not Reflect Clear Congressional Intent To Diminish The Reservation.

A. Use of Post-Enactment History Is Highly Disfavored and Should Be Used With Great Caution.

In any other context, use of post-enactment legislative history—perhaps better characterized as "legislative future"?[5]—is highly disfavored to say the least. That is because such evidence is a poor indicator of congressional intent *at the time Congress acted.* "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz*, 562 U.S. at 242. Such evidence "by definition 'could have had no effect on the congressional vote.'" *Id.* And, "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *CPSC v. GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980).

Here, the ultimate question remains the intent of the Congress that enacted the 1882 Act, which is the legislation alleged to have diminished the Reservation. Thus, all of the cautions about post-enactment legislative history are fully applicable. And while the Court has allowed limited consideration of post-enactment history and subsequent demographic trends to shed light on whether an earlier Congress diminished a reservation, it has

---

[5] *See United States v. SCS Bus. Inst.*, 173 F.3d 870, 878-79 (D.C. Cir. 1999) (Silberman, J.).

repeatedly acknowledged the limits of such evidence. For example, the Court has "often observed ... that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Yankton*, 522 U.S. at 355. And, with some understatement, the Court warned that use of post-enactment history is an "unorthodox and potentially unreliable method of statutory interpretation." *Solem*, 465 U.S. at 472 n.13.

In light of the well-established limits of such post-enactment evidence, this Court has held that "[w]hen both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place." *Id.* at 472. What in any other context would be dismissed as "a contradiction in terms" cannot be the dispositive basis for depriving a Tribe of sovereignty. Any other rule would make a mockery of both the insistence that evidence of diminishment be "clear and plain," and the canons of construction that counsel solicitude for, not discrimination against, Tribes.

B. Statutes Enacted Shortly After the 1882 Act Demonstrate Congressional Intent Not to Diminish.

If any post-enactment history has probative value in ascertaining Congress' intent in 1882, it is what Congress itself said (and did) shortly after passing the 1882 Act. In the context of the Omaha Reservation, the district court analyzed five statutes enacted between 1885 and 1894 and concluded that those

statutes were consistent with congressional intent *not* to diminish the Reservation. Pet.App.70-72.

First, these statutes repeatedly referred to the opened area as "the 'Omaha Indian Reservation' and 'Omaha lands.'" Act of Aug. 2, 1886, 24 Stat. 214; Act of May 15, 1888 ("1888 Act"), 25 Stat. 150; Act of Aug. 19, 1890, 26 Stat. 329; Act of Aug. 11, 1894 ("1894 Act"), 28 Stat. 276. This Court has viewed post-enactment statutory references to the land in question as a "reservation" as cutting against a finding of diminishment. *See Solem*, 465 U.S. at 478-79 (reference to "lands in the Cheyenne River Indian Reservation" in subsequent legislation suggested that "the opened area was still part of the reservation").

Second, the statutes passed shortly after the 1882 Act confirm that the United States continued to serve as trustee over the opened area and that sale proceeds from purchases by individual settlers were for the Tribe's benefit. *See, e.g.*, 1888 Act, §3, 25 Stat. at 151. Those facts are also consistent with the maintenance of the Reservation's boundaries. *See Ash Sheep v. United States*, 252 U.S. 159, 164-66 (1920) (distinguishing between United States' status as a tribe's trustee and its acquisition of unrestricted title to tribal lands by cession).

Third, certain post-1882 statutes required the Omaha Tribe's consent before granting payment extensions to buyers of parcels west of the right-of-way. For example, the 1894 Act stated that it "shall be of no force and effect until the consent thereto of the Omaha Indians shall be obtained." 1894 Act, 28 Stat. at 277. As with the grant of the railroad easement in 1880, this requirement of tribal consent makes little

sense if the land were no longer part of the Reservation.

Later statutes obviously shed substantially less light on the intent of the 1882 Congress, *cf. District Of Columbia v. Heller*, 554 U.S. 570, 614-16 (2008), but even later statutes that allowed Nebraska to tax Omaha lands suggest that Congress did not relinquish jurisdiction over lands both east and west of the right-of-way. In 1910, Congress enacted a statute that subjected Omaha lands allotted to Indians before 1885 to appraisal, assessment, and taxation "for local, school district, road district, county. and state purposes as provided by the laws of the State of Nebraska." J.A.962-63; Act of May 6, 1910, 36 Stat. 348, 348. This Act applied to all lands, both east and west of the right-of-way, showing that Congress believed it had jurisdiction on both sides of the Reservation. This congressional authorization of state taxation suggests that Congress had authority over the entire Reservation and simply *permitted* Nebraska to tax certain portions of it. That assertion of congressional jurisdiction is plainly inconsistent with diminishment of the Reservation in 1882.

Of course, none of this evidence is definitive as to what Congress intended in 1882 because of the limited value of post-enactment legislative "history." *See Bruesewitz*, 562 U.S. at 242. But the evidence need not be definitive for Respondents to prevail because the *party asserting diminishment* has the burden of proof and must prove diminishment by "substantial and compelling" evidence. *Solem*, 465 U.S. at 472. Congress' actions in the decades following 1882 are

flatly inconsistent with an intent to diminish the Reservation.

C. The "Mixed Record" of Other Post-Enactment Evidence Sheds Little Light on Congress' Intent.

Respondents do not dispute that, as both lower courts concluded, the post-enactment evidence in the record is "mixed." *See* Pet.Br.24-38. But the record is truly mixed, and Petitioners' brief tells only half the story, as there is significant post-enactment evidence beyond the relatively contemporaneous statutes that weighs heavily *against* a finding of diminishment.

The district court carefully examined the *entire* record and concluded that the post-enactment evidence was "mixed." This evidence "fails to reveal a consistent or dominant approach to the territory at issue," is of "'limited interpretive value,'" and "cannot be considered dispositive" of whether Congress intended to diminish the Omaha Reservation in 1882. Pet.App.72-73. Examining the same evidence *de novo*, the Eighth Circuit unanimously affirmed, concluding that "the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts provided by the Supreme Court as well as this court." Pet.App.6.

Under the "two court rule," this Court does not ordinarily review factual determinations concurred in by two lower courts. *See, e.g.*, *United States v. Ceccolini*, 435 U.S. 268, 273 (1978). Petitioners offer no good reason to depart from that settled practice here, as the record fully supports the lower courts'

finding of a "mixed" evidentiary record on the third *Solem* factor.[6]

1. Over the past 130 years, the U.S. government has indicated many times that the 1882 Act did not diminish the Omaha Reservation. As the district court found, "[o]n January 31, 1884, eighteen months after the passage of the 1882 Land Act, federal cartographers working for the [Bureau of Indian Affairs (BIA)] drafted a map indicating that boundaries of the reservation remained the same: lands to the west of the railroad right-of-way remained part of the reservation." J.A.968, 1129. Also, "[i]n 1900, Secretary of Interior Ethan Allen Hitchcock ruled that settlers who purchased land west of the railroad right-of-way were not subject to homestead

---

[6] Having obtained certiorari on the promise of briefing a legal issue of general importance concerning the role of the third *Solem* factor when the first two factors are "ambiguous," Petitioners essentially ignore their first "question presented" in favor of a factbound argument about the Omaha Reservation that asks this Court to disregard the factual and legal findings of both federal courts and all four federal judges to consider the matter. Having secured plenary review, Petitioners' *volte face* is understandable from a tactical standpoint, as both courts below carefully considered evidence regarding all three *Solem* factors, *see* Pet.App.6-7; Pet.App.69-76; BIO at 10-11, and relying on post-enactment history alone to find a "clear and plain" indication of congressional intent when it passed the 1882 Act has nothing to recommend it. But while Petitioners' bait-and-switch serves their own interests, it is far less clear it serves this Court's interests. Because Petitioners have abandoned their first question presented, this Court might wish to dismiss the writ of certiorari as improvidently granted. *See City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *id.* at 1779 (Scalia, J., concurring in part, dissenting in part).

legislation because they were settled on lands 'in the Omaha reservation.'" Pet.App.36; *see also* J.A.939-40.

More recently, the United States has on multiple occasions indicated that the Omaha Reservation was not diminished by the 1882 Act. *See, e.g.*, J.A.141-44 (October 2012 letter from U.S. Attorney describing criminal jurisdiction on Omaha Reservation, including within the disputed area); J.A.1250 (April 2012 memo from Deputy Solicitor for Indian Affairs indicating that Reservation was not diminished); J.A.1135-36 (May 2007 letter indicating that Census Bureau would continue to map Pender as part of the Reservation).

Petitioners rely heavily on the U.S. government's treatment of the disputed land in the years following passage of the 1882 Act, focusing in particular on actions taken by BIA. Pet.Br.34-36. But that evidence is overshadowed by the fact that the Commissioner of Indian Affairs and other Executive-Branch officials repeatedly *frustrated* Congress' intent in their implementation of the 1882 Act. For example, those officials—particularly Commissioner of Indian Affairs Hiram Price—took actions to prevent Omaha Tribe members from exercising their statutory right to purchase allotments west of the right-of-way. *See* J.A.951 (noting "Price's efforts in dismantling Congressional intent in regard to the Omahas' right to purchase individual acreages west of the railroad right of way"). BIA's well-documented efforts to undermine the 1882 Act suggest that the agency's views about the status of that land are an especially poor indicator of the enacting Congress' intent.

2. The State of Nebraska has both expressly and implicitly acknowledged that Pender lies within the Omaha Reservation's boundaries. Since 1922, the Nebraska legislature has defined the western boundary of Thurston County as the Omaha Reservation's western boundary. Pet.App.40-41. The State's description of Thurston County maps onto the boundaries of the Omaha Reservation *pre-dating* the 1882 Act. Neb. Rev. Stat. §22-187.

Additionally, in 1969, the Nebraska legislature "retrocede[d]" to the United States "all jurisdiction over [most] offenses committed by or against Indians in the areas of Indian country located in Thurston County. Nebraska." J.A.1123. In 1970, the State's retrocession was accepted by the Interior Department, which indicated that the retroceded land was bounded by "the west boundary line of the Omaha Indian Reservation *as originally surveyed*." 35 Fed. Reg. 16,598, 16,598 (1970) (emphasis added).[7] This boundary aligns with the western boundary of the Omaha Reservation following the 1854 Treaty and includes the disputed area. More recently, the Omaha Tribe and Nebraska signed a cross-deputization agreement that permitted deputized members of both Nebraska and tribal police to make certain arrests on the tribal lands, including in Pender. Pet.App.51.

---

[7] Petitioners have argued that the language "as originally surveyed" suggests that the Reservation was diminished. But the Interior Department's notice involved *retrocession* of Nebraska's criminal jurisdiction over land in its State to the federal government. If the land in question were not part of the Reservation, there would have been no reason—and likely no basis—for retrocession.

With respect to taxation, Nebraska's tax commissioner issued a ruling in 1992 locating Pender "within the boundaries of the Omaha Indian Reservation." Pet.App.48. Furthermore, in 2005, the Omaha Tribe and Nebraska entered into a tax sharing agreement based on sales of motor fuel on the Reservation. The agreement covered lands west of the right-of-way, including Pender. When several motor fuel retailers sued Nebraska for collecting these taxes in Pender, Nebraska stated in a brief: "Plaintiffs contend that Pender is not part of the reservation. Those assertions have no factual basis." ECF Doc. 24, at 4, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. July 20, 2006). Nebraska subsequently retracted its admission, claiming to have never conceded that Pender was located within the Reservation. *Id.*, ECF Doc. 31, at 1-2 (Oct. 23, 2006). Only in February 2007 did Nebraska fully retreat from its earlier position that Pender was located within the Omaha Reservation. J.A.298. For several years after that purported retraction, Thurston County's website continued to indicate that the Omaha and Winnebago Reservations "cover the entire Thurston County area." Pet.App.42.

Petitioners attempt to draw some meaning from Nebraska's assumption of responsibility for providing certain services in Pender and other towns west of the right-of-way. Pet.Br.33-34. But the assumption of responsibilities by a state government says nothing about the continued reservation status of Indian lands. States and tribes often coordinate regarding the provision of services, with one taking responsibility for the provision of certain services in the jurisdiction of the other. "The reality is that, at

the local level in and around tribal lands, tribes, states and local governments cooperate daily and share responsibilities for government services on a broad range of issues." Nat'l Conference of State Legislatures, *Government to Government: Models of Cooperation Between States and Tribes* 3 (2009), *available at* perma.cc/ay6f-p9ns.

In fact, Nebraska law permits tribes located in the State to enter into agreements with public agencies to perform government services that any government entity is authorized to perform. Neb. Rev Stat. §13-1503. Thus, the provision of services by state and local governments on tribal lands is not at all inconsistent with the continued reservation status of those lands. Based on the *entire* factual record, Nebraska's treatment of the disputed land provides no clear and plain evidence of diminishment.

3. Demographic trends following the 1882 Act's passage also do not reflect a clear congressional intent to diminish the Reservation in 1882. This Court has held that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem*, 465 U.S. at 471. But this consideration is "the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet ... not every surplus land Act diminished the affected reservation." *Yankton*, 522 U.S. at 356. When the intent of Congress was to permit settlement without diminishment, the fact of subsequent settlement in no

way counters the contemporaneous intent not to diminish.

The "de facto" diminishment inquiry discussed in *Solem* is not some free-form inquiry detached from congressional purpose. Rather, it is simply another interpretive method—the concededly "least compelling" one—for discerning congressional intent behind the act alleged to have diminished the reservation. Here, the intent of the 1882 Act and the 1882 Congress remains the focus. And the subsequent demographics of the Omaha Reservation provide no meaningful answers to the question of whether Congress intended to diminish the Reservation, and certainly do not overcome the textual and contextual factors pointing in the other direction, for several reasons.

First, as a legal matter, populations may fluctuate, but the enacting Congress' intent remains the same. The possibility that a reservation might be diminished based solely on ever-shifting demographic trends runs directly counter to this Court's repeated admonition that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470. If present-day demographics of an area are sufficient to find diminishment, a reservation's status could change merely through the passage of time, in a manner that is completely unmoored from any action by Congress.[8]

---

[8] This concern is not merely hypothetical. In 1920, Indians comprised only 15% of the population of the eastern part of the Reservation. Under Petitioners' de facto diminishment test, the eastern part of the Reservation might have been deemed

Second, this is a particularly odd case for subsequent demographic trends to make an outcome-determinative difference. The 1872 and 1882 Acts share similar textual features, with the only material differences making it less likely that the 1882 Act diminished the Reservation. *See supra* Parts I.D, II.A. No one contends that the 1872 Act diminished the Reservation. While the far greater settlement that followed the 1882 Act surely demonstrates that Congress' later effort to encourage settlement was more successful, it does not demonstrate that Congress was attempting to accomplish something fundamentally different in the 1882 Act. To the contrary, when Congress wanted to accomplish something fundamentally different, it used fundamentally different language, as in the 1854 and 1865 Treaties. Subsequent demographic trends can confirm Congress' intent—as when the Winnebago replaced the Omaha on the land ceded in the 1865 Treaty—but demographic patterns alone are no substitute for congressional intent to diminish, especially where subsequent settlement is not inconsistent with Congress' intent to open land for settlement without diminishment.

In all events, the district court correctly found as a factual matter that the Omaha Tribe has played a continuous role in the western side of the Reservation, even if the western portion has a relatively high proportion of non-Indians. There have always been Indians who have lived and worked in, and engaged with, the Pender community. They have maintained

---

diminished in 1920, even though Congress unquestionably did not intend this.

a steady presence in the area, and their population has not diminished substantially since Indians selected allotments as part of the 1882 Act. J.A.204, 350.[9]

This Court has never before found diminishment based *solely* on demographic trends or non-Indians' expectations. Nor should it do so here. In all of the cases cited by Petitioners in which this Court has looked to demographic evidence, there was clear and plain evidence of diminishment in at least the text of the statute, the contemporaneous legislative history, or both, something that Petitioners readily acknowledge is not true here. *See Yankton*, 522 U.S. at 356-57; *Hagen*, 510 U.S. at 421; *Rosebud*, 430 U.S. at 604-05; *DeCoteau*, 420 U.S. at 428; *see also* Pet.Br.i (evidence as to the first two *Solem* factors is "ambiguous").[10]

---

[9] Moreover, given the Executive Branch's improper efforts to prevent Omaha Tribe members from purchasing allotments west of the right-of-way, *see supra* Part III.C; J.A.947-52, the resulting post-enactment settlement patterns are a particularly poor indicator of congressional intent.

[10] Amici the Village of Hobart and the Pender Public Schools assert that, under *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-16 (2005), the "longstanding assumption of jurisdiction by [a] State" may "create 'justifiable expectations'" that warrant diminishment. But, as amici concede, Petitioners neither raised this argument below nor presented it in their petition for certiorari. *See* Hobart.Br.4; Sup.Ct.R.14.1(a) (Court will consider "[o]nly the questions set out in the petition, or fairly included therein"). In all events, *Sherrill* arose in the very different context of a Tribe that was attempting to foreclose a taxation power that had long been exercised by a non-tribal city government. *See* 544 U.S. at 214-20. The Court did not address whether Congress had diminished or disestablished a reservation.

IV. Finding Diminishment Based On The "Mixed Record" Of Evidence On The Third *Solem* Factor Would Produce Harmful And Anomalous Consequences.

Petitioners' novel and unprecedented theory of diminishment is not only inconsistent with this Court's precedent, but would result in a number of deeply problematic consequences. There is no compelling reason to take that drastic step given that existing doctrine provides ample protection of the rights of non-Indians who live on reservation lands.

A. At the heart of this Court's diminishment doctrine is the basic proposition that deprivations of Indian sovereignty must come from congressional action and, like other deprivations of sovereignty, only clear congressional action will do. *Yankton*, 522 U.S. at 343. Neither subsequent settlers nor later mapmakers can do the job for Congress. Thus, adopting Petitioners' freeform theory of de facto diminishment would undercut Congress' power to determine the boundaries of Indian reservations. *See id.* ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights."). Congress can easily act to diminish a reservation if it so chooses. It needs neither the Tribe's nor any State's consent. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). But precisely because the power does not depend on anyone's consent, it is critical to ensure that Congress *actually intended* to employ that sweeping power.

Courts, of course, are well-suited to discerning congressional intent from text and context. But administering a freestanding doctrine of "de facto"

diminishment unmoored from congressional intent would be a job for demographers, not jurists. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality op.) (rejecting claim where "no judicially discernible and manageable standards ... have emerged"); *id. at* 306-07 (Kennedy, J., concurring in judgment) (expressing concern about "the absence of rules to limit and confine judicial intervention").

B. Petitioners' approach also risks creating unnecessary conflict between Tribes and neighboring state and local governments. First, Petitioners' focus on the assumption of state jurisdiction over tribal lands would undercut cooperation among tribal, state, and local governments. If the rule of sovereignty becomes "use it or lose it," and the provision of services by state or local governments can "de facto" diminish a reservation, then tribes would have strong reasons not to share or consolidate services, lest that sharing or consolidation be cited against the tribe in a future diminishment proceeding. Needless to say, it is not in anyone's interest to disincentivize cooperation between tribal and non-tribal governments concerning communities located on reservations. Indeed, Nebraska's own policy encourages tribes and the State to work together to allocate responsibility for provision of various services. *See* Neb. Rev. Stat. §13-1503.

Basing a reservation's boundaries on ever-changing demographic trends, as opposed to laws fixed in the statute books, would also give tribes an incentive to keep non-Indians from locating on reservations out of fear that it would diminish the "Indian character" of their land and force them to

relitigate the previously well-defined boundaries of their reservations.

C. Finally, to the extent Petitioners are motivated by concerns over the rights of non-Indians on Indian land, their concerns are misdirected. No matter how this Court decides this diminishment case, hundreds of thousands of non-Indians will continue to live on Indian lands throughout the country, including on the eastern portion of the Omaha Reservation. Those non-Indians enjoy numerous constitutional and non-constitutional protections, and there are significant constitutional and statutory limits on tribes' authority over non-Indians. *See, e.g.*, *Oliphant*, 435 U.S. 191 (limiting tribal criminal jurisdiction); *Montana*, 450 U.S. 544 (limiting tribal civil regulatory jurisdiction over non-Indians on non-Indian fee land within reservations); *Atkinson Trading v. Shirley*, 532 U.S. 645 (2001) (limiting tribal taxation authority over non-Indian conduct on reservations). To the extent those existing protections are deemed insufficient—and Petitioners have never suggested they are—any additional protections should be achieved in a *uniform* and *generally applicable* manner, not by carving out a few thousands individuals from the Omaha Reservation on an ad hoc basis in ways the 1882 Congress never intended.

Indeed, this very case demonstrates that Congress retains an active role in protecting all interested parties. The Omaha Tribe was able to enact its Beverage Control Ordinance only pursuant to *express statutory authority* granted by Congress. *See* 18 U.S.C. §1161. And even after the Tribe adopted that ordinance, the law could not take effect until it

was certified by the Interior Department. *Id.* Section 1161 also ensures that alcohol sales in Indian country will be conducted "in conformity ... with the laws of" Nebraska. *Id.* This dual tribal-state jurisdiction over alcohol sales prevents the "parade of horribles" that Petitioners and amici allude to but never actually describe. As long as reservation boundaries are defined clearly—which would not be the case under the expansive de facto diminishment doctrine Petitioners champion—state, local, tribal, and federal officials can work cooperatively to allocate and, where appropriate, share jurisdiction.

* * *

In sum, a long line of this Court's cases reflect the principle that Acts of Congress should be construed to favor tribes and tribal sovereignty. Those cases certainly support the Omaha Tribe's position here, but there is no need to resort to them. The issue here, as in all statutory interpretation cases, is the intent of the Congress that passed the relevant statute. In every other context, that inquiry focuses on the text and, to varying degrees, the legislative history. Petitioners essentially admit that the text is against them and that the legislative history is at best ambiguous. Those concessions would be fatal in any other context, but here Petitioners face the added burden of showing a "clear and plain" intent to abrogate sovereignty. Thus, unless the Indian canons are to be flipped on their heads, the decisions of both federal courts and all four federal judges should be affirmed.

CONCLUSION

This Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
SUBASH S. IYER
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

MAURICE R. JOHNSON
Attorney General
Omaha Tribe of
Nebraska
100 Main Street
Macy, NE 68039

NORA M. KANE
STINSON LEONARD
STREET LLP
1299 Farnam St.
Suite 1500
Omaha, NE 68102

MARK J. PETERSON
PETERSON LAW
OFFICE, LLC
5201 Chicago Street
Omaha, NE 68132

PATRICIA A. ZIEG
PATRICIA A. ZIEG LAW
OFFICES, LLC
1327 South 35th Ave.
OMAHA, NE 68105

Counsel for Omaha Tribal Council Respondents

December 16, 2015

No. 14-1406

In the Supreme Court of the United States

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
WILLIAM B. LAZARUS
MARY GABRIELLE SPRAGUE
KATHERINE J. BARTON
DARON CARREIRO
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Congress diminished the boundaries of the Omaha Indian Reservation by the Act of Aug. 7, 1882, ch. 434, 22 Stat. 341.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 12
Argument:
I. The 1882 Act did not diminish the Omaha Reservation 14
A. The text of the 1882 Act demonstrates that Congress did not intend to diminish the Omaha Reservation 16
B. The historical context and legislative history of the 1882 Act do not demonstrate an intent to diminish the Omaha Reservation 28
C. The subsequent treatment of the area and the pattern of settlement do not support a finding of diminishment 37
1. Congress 38
2. The Department of the Interior 40
3. The State of Nebraska 42
4. The pattern of settlement 44
5. Treatment of the area from 1961 to the present 45
II. Present-day expectations cannot justify diminishing the Omaha Reservation 53
Conclusion 55
Appendix — Statutory provision 1a

TABLE OF AUTHORITIES

Cases: Page

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 26

City of Sherrill v. *Oneida Indian Nation*, 544 U.S. 197 (2005) 13, 53, 54

DeCoteau v. *District Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425 (1975) 16, 19, 23, 25

Duncan Energy Co. v. *Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), cert. denied, 513 U.S. 1103 (1995) 22

Hagen v. *Utah*, 510 U.S. 399 (1994) ..... *passim*

Hallowell v. *Commons*, 239 U.S. 506 (1916) 45

Hallowell v. *United States*, 221 U.S. 317 (1911) 45

Mattz v. *Arnett*, 412 U.S. 481 (1973) 18, 24, 26, 32

Mitchel v. *United States*, 34 U.S. (9 Pet.) 711 (1835) 27

Montana v. *United States*, 450 U.S. 544 (1981) 8

Omaha Tribe v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) 49

Rice v. *Rehner*, 463 U.S. 713 (1983) 8

Rosebud Sioux Tribe v. *Kneip*, 430 U.S. 584 (1977) ..... *passim*

Seymour v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) 17, 24, 26

Solem v. *Bartlett*, 465 U.S. 463 (1984) ..... *passim*

South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) ..... *passim*

United States v. *Celestine*, 215 U.S. 278 (1909) 54

United States v. *Chase*, 245 U.S. 89 (1917) 45

Treaties and statutes:

Treaty with the Omahas, Mar. 16, 1854, 10 Stat. 1043 ..... *passim*
Treaty with the Omaha Indians, Mar. 6, 1865, 14 Stat. 667 ..... *passim*
Act of June 10, 1872, ch. 436, 17 Stat. 391 ..... *passim*
Act of June 22, 1874, ch. 389, 18 Stat. 146:
18 Stat. 146-147 4
18 Stat. 170 4
Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 ..... *passim*, 1a
Act of Mar. 3, 1885, ch. 341, 23 Stat. 370 ..... 7, 38
Act of Aug. 2, 1886, ch. 844, 24 Stat. 214 ..... 7, 38
Act of May 15, 1888, ch. 255, 25 Stat. 150:
§ 2, 25 Stat. 150 ..... 7, 38
§ 3, 25 Stat. 151 39
Act of Aug. 19, 1890, ch. 803, § 1, 26 Stat. 329 ..... 7, 39
Act of Aug. 11, 1894, ch. 255, 28 Stat. 276:
28 Stat. 276 ..... 7, 39
28 Stat. 277 39
Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80:
§ 1, 34 Stat. 80 24
§ 3, 34 Stat. 81 24
Act of May 11, 1912, ch. 121, § 1, 37 Stat. 111 7
Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162; 28 U.S.C 1360) 48
18 U.S.C. 1154 8
18 U.S.C. 1156 8
18 U.S.C. 1161 ..... 8, 9
18 U.S.C. 1162 52
25 U.S.C. 1323 48

Statutes—Continued: Page

Neb. Rev. Stat. Ann.:
§ 22-187 (LexisNexis 2011) 43
§ 66-741 (LexisNexis 2014) 50

Miscellaneous:

Black's Law Dictionary (10th ed. 2014) 27
13 Cong. Rec. (1882):
p. 6540 30
pp. 6540-6541 30
p. 6541 30
35 Fed. Reg. 16,598 (Oct. 24, 1970) 48
71 Fed. Reg. 10,056 (Feb. 28, 2006) 8
H.R. Rep. No. 2684, 51st Cong., 1st Sess. (1890) 39
Indian Law Enforcement Improvement Act of 1975: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976) 49
Leg. Res. 234, 100th Leg., 2d Sess. (Neb. 2008) 49
Letter from Jon Bruning, Neb. Att'y Gen., to Hobert Rupe, Exec. Dir., Neb. Liquor Control Comm'n (Feb. 15, 2007) 52
Letters Received by the Office of Indian Affairs, 1824-81, M234, Roll 606 ..... 4, 18, 23
Opinion by Assistant Att'y Gen. Van Devanter to the Sec'y of the Interior, 30 Pub. Lands Dec. 82 (D.O.I. 1900) 19, 41
Neb. Rev. Rul:
99-76-6 (Oct. 13, 1976) 49, 50
99-89-2 (Sept. 29, 1989) 50
99-90-1 (Apr. 3, 1990) 50
99-92-1 (Mar. 6, 1992) 40, 50

Miscellaneous—Continued: Page

99-05-01 (Sept. 29, 2005) 50
S. 200, 47th Cong., 1st Sess. (1881) 29
S. 1255, 47th Cong., 1st Sess. (1882) 29
S. Misc. Doc. No. 31, 47th Cong., 1st Sess. (1882) 29
U.S. Geological Survey, *The Public Land Survey System*, http://nationalmap.gov/small_scale/a_plss.html (last visited Dec. 16, 2015) 5

In the Supreme Court of the United States

No. 14-1406

STATE OF NEBRASKA, ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 774 F.3d 1166. The opinion of the district court (Pet. App. 9-78) is reported at 996 F. Supp. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2015. A petition for rehearing was denied on February 26, 2015 (Pet. App. 80-81). The petition for a writ of certiorari was filed on May 27, 2015. The petition was granted on October 1, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 is reproduced in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The Omaha Tribe settled in the Missouri River valley more than 500 years ago. Over the course of several centuries, the Tribe established villages in northeastern Nebraska, farmed the land, and hunted deer and bison across the plains. But the Tribe increasingly found itself threatened by westward expansion, warfare with other tribes, and disease. Following the United States' acquisition of its territory in the Louisiana Purchase, the Tribe turned to the United States for protection. J.A. 875-879.

a. In 1854, the Omaha Tribe entered into a treaty with the United States "reserv[ing]" land for the Omahas "for their future home." Treaty with the Omahas, Mar. 16, 1854 (1854 Treaty), 10 Stat. 1043 (J.A. 1019-1028). The Tribe agreed to "cede to the United States" and "forever relinquish all right and title to" a portion of its historic lands "[i]n consideration of" a fixed sum of $840,000. J.A. 1020, 1022. The remaining land, which was designated the Omaha Reservation, comprised 300,000 acres in northeast Nebraska. Pet. App. 20.

In 1865, the Omaha Tribe agreed to "cede, sell, and convey" to the United States approximately 98,000 acres from the northern part of the Reservation "[i]n consideration of" a fixed sum of $50,000 and certain other promises. Treaty with the Omaha Indians, Mar. 6, 1865 (1865 Treaty), 14 Stat. 667 (J.A. 1014-1019); see Pet. App. 21. The 1865 Treaty required the Tribe to "vacate and give possession of the lands ceded" by the treaty "immediately after its ratification," so that the land could be made available to the Winnebago Tribe. J.A. 1015; see J.A. 1018. The 1865 Treaty also authorized allotments from the remainder to be made

to individual members of the Omaha Tribe. J.A. 1016-1017. Relatively few Omahas chose allotments, however. Most continued to reside in "kinship communities" near the Missouri River on the eastern side of the Reservation and to hunt on the Tribe's traditional hunting grounds near its western border. J.A. 898.

In 1872, the Tribe requested help in raising additional funds to aid the transition of its members to farming. J.A. 898-899. In response, Congress authorized the Secretary of the Interior, "with the consent and concurrence of the Omaha tribe," to survey, appraise, and sell up to 50,000 acres on the western side of the Reservation, to be delineated by a north-south line. Act of June 10, 1872 (1872 Act), ch. 436, 17 Stat. 391 (J.A. 631-635). Unlike the 1854 and 1865 Treaties, the 1872 Act did not provide that the United States itself would purchase the land. Instead, it authorized the Secretary "to offer the [land] for sale," to solicit "sealed proposals," and to accept "the highest bids"—provided that the bid was no less than the appraised value of the land or $1.25 per acre. J.A. 631-632. The proceeds were to be deposited in the United States Treasury to be used for the benefit of the Tribe. J.A. 632. The 1872 Act failed, however, to raise substantial funds for the Omahas: Only two sales comprising 300.72 acres were made under the statute. Pet. App. 23, 41.

In 1874, the Omaha Tribe sold to the United States an additional 12,374.53 acres from the northeastern corner of the Reservation for use by the Winnebago Tribe. J.A. 196. The Omahas agreed, "in consideration of the sum of [$30,868.87]," to "grant, bargain, sell and convey to the United States * * * all the right, title and interest of the Omaha Indians, in and to" the

land. *Letters Received by the Office of Indian Affairs, 1824-81*, M234, Roll 606, 839-842 (1874 Conveyance); see Act of June 22, 1874, ch. 389, 18 Stat. 146-147, 170 (appropriating funds for the purchase).

In 1880, the Tribe entered an agreement with the Sioux City and Nebraska Railroad Company granting a right of way "across the Omaha Reservation." C.A. App. 2325. The right of way cut diagonally across the Reservation through the lands identified for sale in the 1872 Act, sloping southeastward along Logan Creek. *Id.* at 2325-2326; J.A. 907. The Tribe obtained a fixed price of $7.00 per acre. J.A. 907.

b. In 1882, Congress again authorized the Secretary to survey, appraise, and offer for sale lands on the western side of the Reservation. See Act of Aug. 7, 1882 (1882 Act), ch. 434, 22 Stat. 341 (J.A. 227-233). The 1882 Act provided that "the Secretary of the Interior [shall] be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company." J.A. 227. Like the 1872 Act, the area made available for purchase totaled approximately 50,000 acres. Pet. App. 25. But because the 1872 Act had used a north-south boundary line—whereas the 1882 Act relied on the diagonally sloping railroad right of way—the areas opened for sale by the two acts did not overlap perfectly: Some of the area that had been opened by the 1872 Act fell east of the right of way, and thus was not available for sale under the 1882 Act. See J.A. 1306 (map).[1]

---

[1] The 50,000 acres opened for sale by the 1872 Act would have extended into Range 7 East, causing the north-south dividing line

The 1882 Act authorized the Interior Secretary to make the land available for sale, in lots of up to 160 acres, to "bona fide settler[s]." J.A. 227; see J.A. 228. Lot sales were permitted at the "appraised value" of the land or $2.50 per acre, whichever was greater, to be paid in three installments. J.A. 228-229. The net sale proceeds—"after paying all expenses" involved in administering the 1882 Act—were to "be placed to the credit of said Indians in the Treasury of the United States" and expended annually for their benefit. J.A. 229.

The 1882 Act also provided for the further allotment of land to members of the Tribe. J.A. 229-233. Allotments made under the 1882 Act were intended "to be in lieu of" (*i.e.*, to supersede) any allotments that had been made under the 1865 Treaty. J.A. 230. Tribal members were permitted to select their allotments "in any part of said reservation either east or west of [the railroad] right of way." J.A. 233. Consistent with then-prevailing Indian policy, the 1882 Act provided that the Secretary would hold each allotment in trust for 25 years. After that time, allottees would receive patents to their allotments in fee from the United States. J.A. 231. Once the process of issuing the patents was completed, all tribal members would "have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska." *Ibid.*

---

between available land and unavailable land to bisect the railroad right of way. See J.A. 1306. Under the Public Land Survey System, land is identified by six-mile vertical columns called ranges and by six-mile horizontal rows called townships. See U.S. Geological Survey, *The Public Land Survey System*, http://nationalmap.gov/small_scale/a_plss.html.

c. To implement the 1882 Act, the Secretary of the Interior appointed Alice Fletcher as special agent and charged her with responsibility "to oversee the allotment process." J.A. 203. Allotment was to take place first, before any lands were opened for sale to settlers. Thus the Commissioner of Indian Affairs instructed Fletcher, "as one of her first duties," to "determine whether any tribal members wanted allotments west of the railroad right of way, so that appraisal of land to be sold could move forward." J.A. 344-345; see J.A. 949 ("[Y]ou will ascertain whether any of the Indians desire to make selections west of the railroad, and if there are any who do, they must be required to make them at *once*.") (citation omitted).

Fletcher encouraged tribal members to select allotments near the right of way, and several did. J.A. 203-204. Fifteen selected allotments that were partially or fully located west of the right of way, and several of those straddled the right of way. J.A. 944. "[T]he total acreage in Omaha allotments lying west of the Sioux City and Nebraska Railroad was approximately 935 acres." *Ibid.* (emphasis omitted). Most of the allotments were instead chosen further east, closer to the Missouri River, where the Tribe had long resided. J.A. 204.

"Upon completion of the initial allotment process, the land west of the railroad right-of-way was opened to settlers on April 30, 1884." J.A. 204. Settlers began to buy up the opened lands, a process that continued for three decades. J.A. 206. Many of the purchasers failed to make the required installment payments, however, and in 1885, Congress authorized extension of the payment deadlines required by the 1882 Act, provided that the Interior Secretary could

obtain "the consent of the Indians." Act of Mar. 3, 1885 (1885 Act), ch. 341, 23 Stat. 370; see J.A. 351-352. Congress authorized several additional extensions—in 1886, 1888, 1890, and 1894—each time referring to the area opened for sale as being "on the Omaha Indian Reservation" or as "Omaha lands." Act of Aug. 11, 1894 (1894 Act), ch. 255, 28 Stat. 276; Act of Aug. 19, 1890 (1890 Act), ch. 803, § 1, 26 Stat. 329; Act of May 15, 1888 (1888 Act), ch. 255, § 2, 25 Stat. 150; Act of Aug. 2, 1886 (1886 Act), ch. 844, 24 Stat. 214.

In 1912, Congress enacted a statute that opened for sale, under terms similar to those of the 1872 and 1882 Acts, nearly all remaining unallotted land on the Reservation—including lands east of the railroad right of way. Act of May 11, 1912 (1912 Act), ch. 121, § 1, 37 Stat. 111. Settlers also purchased much of the allotted land, which became eligible for sale once it was no longer held in trust by the United States.[2] See J.A. 961 ("By 1916, nearly ninety percent of all Omaha allottees holding fee-patents had either sold their lands or mortgaged them so heavily that they had little chance of ever reclaiming them."). As of 1920, Indians made up only about 15% of the population east of the right of way. J.A. 366.

2. Pender, Nebraska, is a town situated on land abutting the west side of the Sioux City and Nebraska

---

[2] Shortly before expiration of the trust period for allotments under the 1882 Act, President Taft extended the trust period for an additional ten years. J.A. 959. But in response to local pressure, the Bureau of Indian Affairs, as authorized by the Burke Act passed in 1906, see J.A. 958, established "competency commissions" intended to identify Omahas who were "competent to manage their allotments," J.A. 959-960. Once deemed competent, a tribal member would be issued a fee patent and permitted to sell his land—which more than 90% did. J.A. 960-961.

Railroad right of way. Pet. App. 11. It was established in 1885, after the western portion of the Omaha Reservation was opened for sale. *Id.* at 38. Pender now has a population of approximately 1300 residents and is the only town within the disputed area; approximately 1200 other people also live in the disputed area. *Id.* at 14-15; J.A. 366. Pender is located in Thurston County, which is wholly encompassed within the area reserved for the Omaha and Winnebago Tribes in the 1865 Treaty. Pet. App. 15; J.A. 357-358.

a. An Indian tribe has been largely divested of jurisdiction over the conduct of non-Indians on fee land within the tribe's reservation as a result of the patenting of the land to non-Indians under surplus-lands and allotment acts. See *Montana* v. *United States*, 450 U.S. 544, 559 & n.9, 565-566 (1981). One exception is Congress's decision to "delegate[] authority to the States as well as to the Indian tribes to regulate the use and distribution of alcoholic beverages in Indian country." *Rice* v. *Rehner*, 463 U.S. 713, 715 (1983). The general prohibition on introducing alcohol into Indian country, see 18 U.S.C. 1154, 1156, does not apply to sales made "in conformity" with state law and with "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register." 18 U.S.C. 1161.

In 2004, the Omaha Tribe adopted an alcoholic beverage control ordinance regulating the sale of alcohol within the boundaries of the Reservation. The ordinance was certified by the Department of the Interior in 2006. 71 Fed. Reg. 10,056 (Feb. 28, 2006). Following certification, the Tribe began notifying

liquor retailers, including retailers in Pender, of its intention to enforce the ordinance. Pet. App. 17-18.

In 2007, Pender and several beverage retailers sued tribal officials in federal district court seeking a declaration that Pender is not within the Omaha Reservation because the 1882 Act had diminished its borders. The plaintiffs sought an injunction barring the Tribe from enforcing its liquor ordinance in Pender. Pet. App. 18. The court granted a temporary restraining order and stayed further proceedings so that the plaintiffs could exhaust their remedies in Omaha tribal court. *Id.* at 18-19. On February 4, 2013, the tribal court concluded that the 1882 Act did not diminish the Reservation's boundaries. J.A. 77-138. This action then resumed in the district court. The State of Nebraska intervened as a plaintiff, denying the Tribe's entitlement to a share of motor fuel tax revenue collected by the State in the disputed area. J.A. 285-299. The United States intervened as a defendant. Pet. App. 47.

b. On cross-motions for summary judgment, the district court ruled in favor of the Tribe. Pet. App. 9-78.[3] To determine whether the 1882 Act had diminished the Omaha Reservation, the court applied the three-prong test articulated in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), for determining whether a statute "clearly evince[s]" the requisite congressional intent to "divest a reservation of its land and diminish its boundaries." *Id.* at 470. Evaluating each factor, the

---

[3] Petitioners conceded that 18 U.S.C. 1161 permits the Tribe to regulate liquor sales "on its reservation land and in 'Indian country,'" Pet. App. 11 n.2, and thus that the Tribe's ordinance applies to liquor retailers in Pender if the retailers are within the Reservation. Petitioners did not appeal that aspect of the court's ruling.

court concluded that the 1882 Act did not diminish the Reservation. Pet. App. 55-76.

First, the district court examined the statutory language, which *Solem* identified as the "most probative evidence of congressional intent." 465 U.S. at 470. The court agreed with petitioners' "admi[ssion]" that the language of the 1882 Act "does not work in their favor." Pet. App. 56. The court based that conclusion on several features of the 1882 Act, including its plain language and the contrast between that Act and "the Omaha Treaties of 1854 and 1865," in which the Tribe "expressly agreed to 'cede, sell, and convey' land to the United States and 'relinquish . . . all claims' thereto in exchange for fixed sums of money." *Id.* at 58 (citations omitted); see *ibid.* ("[B]oth Congress and the Tribe knew how to alter the reservation boundaries when they chose to do so.").

Second, the district court examined "[t]he legislative history and the circumstances surrounding the 1882 Act." Pet. App. 63. In the court's view, "[n]one of th[e] legislative history establishes that Congress clearly contemplated" diminishment of the Reservation boundaries. *Id.* at 65. The court further concluded that the evidence was "insufficient to establish an 'unequivocal,' widely held, contemporaneous understanding that the 1882 Act would diminish or alter the boundaries of the Omaha Reservation." *Ibid.* (quoting *Solem*, 465 U.S. at 471).

Third, the district court analyzed the subsequent treatment of the disputed area and the pattern of settlement—which this Court has considered "'less illuminating' than contemporaneous evidence." Pet. App. 69 (quoting *Hagen* v. *Utah*, 510 U.S. 399, 420 (1994)). The district court concluded that "the Omaha

Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." *Id.* at 72. The court also found "'mixed' evidence regarding the demographics of the area west of the right-of-way." *Id.* at 76 (citation omitted).

Summarizing its findings, the district court stated:

> [N]either the 1882 Act's statutory language, the legislative history and circumstances surrounding the passage of the Act, nor the demographic history of the land west of the right-of-way demonstrate clear congressional intent to diminish the boundaries of the Omaha Indian Reservation or a widely-held, contemporaneous understanding that Congress's action would diminish those boundaries.

Pet. App. 77.

c. The court of appeals affirmed. Pet. App. 1-8. Based on its "de novo review," *id.* at 6, the court concluded that the district court had

> accurately discerned the contemporaneous intent and understanding of the 1882 Act. The [district] court carefully reviewed the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends, and did so in such a fashion that any additional analysis would only be unnecessary surplus.

Id. at 7. The court of appeals thus found "nothing in this case to overcome the 'presumption in favor of the continued existence' of the Omaha Indian Reservation." *Ibid.* (citation omitted).

SUMMARY OF ARGUMENT

I. When deciding whether an Indian tribe's reservation has been diminished, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984). The district court and court of appeals correctly determined that Congress did not intend for the 1882 Act to diminish the Omaha Reservation.

A. "The most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, is the language of the 1882 Act itself. The 1854 and 1865 Treaties and the 1874 Conveyance all used express language of cession to transfer land from the Tribe to the United States in return for a fixed sum. The 1882 Act, by contrast, merely authorized the Secretary of the Interior to make land available for sale to settlers at a minimum price, with the proceeds to "be placed to the credit of" the Tribe. J.A. 229. "This reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent." *Solem*, 465 U.S. at 473. That conclusion is reinforced by comparing the 1882 Act to the nearly identical provisions of the 1872 Act, which, petitioners admit, did not diminish the Reservation.

B. Nor do the course of negotiations with the Tribe or congressional debates on the 1882 Act provide the "unequivocal[]" evidence necessary to demonstrate "a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. To the contrary, they show that Congress intended for the 1882 Act to accomplish the same objectives as the 1872

Act, which Congress did not understand to have resulted in diminishment. And changes made to the statutory language during the legislative process render petitioners' reading even less plausible.

C. Finally, the subsequent treatment of reservation lands and the pattern of settlement, while "rife with contradictions and inconsistencies," *Solem*, 465 U.S. at 478, generally support the conclusion that Congress intended the 1882 Act to leave the Omaha Reservation's borders intact. In the years following its passage, Congress extended the payment period for lands made available for sale under the Act five times, each time making clear that the Tribe possessed a continuing stake in those lands. Contemporaneous Interior Department reports, as well as maps created by the federal government and Nebraska, repeatedly represented the Reservation's traditional, undiminished western border. Although the settler population in the disputed area increased as a result of the 1882 Act, so did its Indian population.

More-recent evidence, although it cannot speak to what Congress intended in 1882, points in the same direction. Most notably, the State has "retroceded" to the federal government most of its congressionally delegated criminal jurisdiction over land in the Omaha Reservation. Officials on both sides understood that retrocession to encompass all of Thurston County, including the western border it shares with the Reservation.

II. Petitioners argue that the "justifiable expectations" of non-members within the disputed area should "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214-215, 219

(2005). But the only question at issue here is whether Congress's intent to diminish the Omaha Reservation is "clear and plain." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citation omitted). Because it is not, the Court should affirm.

ARGUMENT

I. THE 1882 ACT DID NOT DIMINISH THE OMAHA RESERVATION

The Constitution gives Congress plenary authority over Indian affairs, "including the power to modify or eliminate tribal rights." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). Just as Congress alone may reserve land for tribal use, "only Congress can alter the terms of an Indian treaty by diminishing a reservation." *Ibid.* Accordingly, the status of disputed land is not a matter of property law, but one of statutory law: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

To determine whether a particular congressional enactment caused a reservation to be diminished, this Court's precedents "have established a fairly clean analytical structure." *Solem*, 465 U.S. at 470. First, "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994). Unmistakable language of diminishment is not required, but the statute must "establish an express congressional purpose to diminish." *Ibid.* (brackets and citation omitted).

Second, courts may also look to "the historical context surrounding the passage" of the legislation, to the extent that it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Hagen*, 510 U.S. at 411. Probative evidence may include "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports." *Solem*, 465 U.S. at 471. Where those sources "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Ibid.*

Once a court has reviewed the statute's text and context, the court will normally be in a position to resolve the diminishment question: If "both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, [courts] are bound * * * to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. Nevertheless, a court may, "to a lesser extent," rely on "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux*, 522 U.S. at 344. While those considerations are "an unorthodox and potentially unreliable method of statutory interpretation," they may provide "one additional clue as to what Congress expected." *Solem*, 465 U.S. at 472 & n.13.

When considering whether an Act of Congress diminished a reservation, the ultimate "touchstone" is "congressional purpose." *Yankton Sioux*, 522 U.S. at 343; see *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977) ("The underlying premise is that congres-

sional intent will control."). That purpose must be "clear and plain" before a court will conclude that Congress intended to "alter the terms of an Indian treaty by diminishing a reservation." *Yankton Sioux*, 522 U.S. at 343 (citation omitted); see *Solem*, 465 U.S. at 470 ("Diminishment * * * will not be lightly inferred."). "Throughout the inquiry," moreover, a court must "resolve any ambiguities in favor of the Indians," *Hagen*, 510 U.S. at. 411, a rule that is given "the broadest possible scope" in diminishment cases, *DeCoteau* v. *District Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975).

In this case, the district court determined, and the court of appeals agreed, that Congress did not intend the 1882 Act to diminish the Omaha Indian Reservation. That conclusion is compelled, first and foremost, by the text of the Act; it is also supported by "the relevant legislative history, contemporary historical context, subsequent congressional and administrative references to the reservation, and demographic trends." Pet. App. 7. Petitioners cannot overcome "[t]he presumption that Congress did not intend to diminish the reservation." *Solem*, 465 U.S. at 481.

A. The Text Of The 1882 Act Demonstrates That Congress Did Not Intend To Diminish The Omaha Reservation

1. "We begin with the Act's operative language." *Solem*, 465 U.S. at 472. Unlike prior agreements between the Omaha Tribe and the United States, the 1882 Act did not purport to transfer land from the Tribe to the government. Rather, the Act "authorized" the Secretary of the Interior "to cause [land within the Reservation] to be surveyed, if necessary, and sold" to settlers. J.A. 227. Nor did Congress set a fixed sum for the opened area. Instead, it provided

for an appraisal process involving "three competent commissioners, one of whom [would] be selected by the Omaha tribe." *Ibid.* Land could be sold at its appraised value or $2.50 per acre, whichever was greater. J.A. 228-229. "[T]he proceeds of [each] sale," moreover, were to be "placed to the credit of" the Tribe into a Treasury account—after deducting the cost of "expenses incident to and necessary for carrying out" the Act. J.A. 229. Those provisions strongly indicate that "[t]he Act did no more than open the way for non-Indian settlers to own land on the reservation," with the United States "acting as guardian and trustee for the Indians" for purposes of the sale. *Seymour* v. *Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356 (1962); see *Solem*, 465 U.S. at 473 ("[R]eference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent.").

The intent of the 1882 Act is even clearer when contrasted with the 1854 and 1865 Treaties and the 1874 Conveyance, all of which had involved the sale of Omaha lands to the United States in return for payment of a fixed sum. This Court has explained that a congressional enactment normally contains sufficient indicia of diminishment when "language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe" with a fixed sum. *Solem*, 465 U.S. at 470. The three prior land transfers fit that mold. The 1854 Treaty provided that the Tribe agreed to "cede to the United States," and "forever relinquish all right and title to," certain land "[i]n consideration of" $840,000. J.A. 1020, 1022. The 1865 Treaty provided that the Tribe would "cede, sell,

and convey" some of its land to the United States "in consideration of" $50,000. J.A. 1015. And the Omahas agreed, in the 1874 Conveyance, to "grant, bargain, sell and convey to the United States * * * all the[ir] right, title and interest" in certain land "in consideration" of $30,868.87. 1874 Conveyance 839-840. All three land transfers thus employed language "precisely suited to th[e] purpose" of diminishment, *Rosebud Sioux*, 430 U.S. at 592 (citation omitted), indicating that "Congress was fully aware of the means by which [diminishment] could be effected," *Mattz* v. *Arnett*, 412 U.S. 481, 504 (1973). The lack of any similar language in the 1882 Act speaks volumes.

Also telling is Congress's decision to open for settlement only the "unallotted lands" lying west of the right of way. J.A. 227. Although a small number of allotments to Omaha tribal members had been made pursuant to the 1865 Treaty, all were on the eastern portion of the Reservation. J.A. 331, 898. At the time of the 1882 Act, therefore, none of the area to be opened for sale had previously been allotted. The 1882 Act's reference to the sale of "unallotted lands" clearly contemplates that its allotment provisions would be carried out *before* the remaining lands could be appraised or sold—hence the instruction, by the Commissioner of Indian Affairs, that the officer overseeing the allotment process should "determine whether any tribal members wanted allotments west of the railroad right of way, so that appraisal of land to be sold could move forward." J.A. 344-345. Indeed, the 1882 Act expressly permitted members of the Tribe to select their allotments "in any part of [the] reservation *either east or west of [the] right of way*." J.A. 233 (emphasis added). That grant of "permis-

sion" for tribal members "to obtain individual allotments on the affected portion of the reservation before the land was officially opened to non-Indian settlers" further indicates that Congress "anticipate[d] that the opened area would remain part of the reservation." *Solem*, 465 U.S. at 474.

The 1882 Act contains other indications that Congress did not intend for the area opened for sale to lose its Reservation status. Unlike other surplus land statutes enacted around the same time, the 1882 Act did not provide that the lands opened for settlement would be "restored to the public domain." *Hagen*, 510 U.S. at 412 (emphasis and citation omitted); see *id.* at 413 ("Statutes of the period indicate that Congress considered Indian reservations as separate from the public domain."). Nor did the 1882 Act provide for purchased lands to be settled "under the homestead and townsite laws of the United States." *DeCoteau*, 420 U.S. at 442 (citation omitted). Rather, the 1882 Act provides for "settlement under such rules and regulations as [the Secretary of the Interior] may prescribe," J.A. 227, and it states that "patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts," J.A. 229. That language is significant, because it indicates Congress's view that settlers who purchased land under the 1882 Act were not buying public lands and thus were "a different class of settlers from those under the [existing] homestead laws." *Opinion by Assistant Att'y Gen. Van Devanter to the Sec'y of the Interior*, 30 Pub. Lands Dec. 82, 83 (D.O.I. 1900); see *ibid.* ("[I]t seems clear that settlers under [the 1882 Act] are not 'settlers under the homestead laws of the United States.'").

Finally, Congress's intent becomes even clearer when the 1882 Act is compared to its predecessor. The 1872 Act was Congress's first attempt to raise funds for the Omaha Tribe by opening a portion of its lands to settlement. See p. 3, *supra*. The earlier Act "authorized" the Secretary of the Interior "to cause to be surveyed, if necessary," 50,000 acres on the western side of the Reservation and to sell the land in lots of up to 160 acres. J.A. 631. It provided for appraisal by "three competent commissioners, one of whom shall be selected by [the] Omaha tribe," and it set a minimum sale price at the appraised value of the land or $1.25 per acre, whichever was greater. *Ibid.*; see J.A. 632. It also provided that proceeds from the sale should be "placed to the credit of" the Tribe into a Treasury account (after deducting a portion to be used for the Tribe's benefit). J.A. 632. The 1872 Act was plainly the model on which the land-opening provisions of the 1882 Act were based.

That conclusion has important implications for reading the later enactment, because petitioners have never argued that the 1872 Act diminished the Omaha Reservation. Nor would such a contention be sustainable. Indeed, had the 1872 Act *already* placed outside the Reservation's borders the 50,000 acres it opened for sale, petitioners could not argue, as they do now, that the 1882 Act was to "intended to alter the Reservation's boundaries" by opening much of the same land for sale. Br. 38 (capitalization and emphasis omitted). It would likewise make no sense for Congress to compensate the Tribe for the sale of lands that had already passed from tribal control; nor would Congress have specified that members of the Tribe could select their allotments "in any part of [the] res-

ervation either east or west of [the] right of way." J.A. 233. And, because the 1872 and 1882 Acts used different lines to mark the eastern boundary of the 50,000 acres offered to settlers—the former used a north-south line, while the latter relied on the diagonally sloping railroad right of way—a portion of the land opened for sale in 1872 was *not* available for sale under the 1882 Act. See p. 4, *supra*. Such land could not have been removed from the Reservation in 1872 yet, without further congressional action, still be part of the Reservation in 1882. It is therefore safe to conclude what petitioners have never disputed: The 1872 Act did not affect the Reservation's borders. See J.A. 573 (petitioners' expert stating that the 1872 Act "did not itself result in an actual diminishment of the Omaha Reservation").

But if Congress did not intend for land-opening language in the 1872 Act to diminish the Reservation, there is no reason to read nearly identical provisions in the 1882 Act to have that effect. See *Rosebud Sioux*, 430 U.S. at 588 (Court should ascribe the same effect to "language with respect to the reservation status of the opened lands [that is] identical with or derivative from the language used in" an earlier agreement that Congress did not approve.). Moreover, by the time it considered the 1882 Act, Congress knew that the 1872 Act had failed to result in the sale of significant acreage within the opened area. See Pet. App. 23. Although Congress and the Tribe were hopeful that another attempt would bear greater fruit, see pp. 29-31, *infra*, they must have contemplated the possibility that the second effort might prove similarly unsuccessful. Because Congress chose to reuse language that had not previously resulted in significant

sales within the opened area, that language likewise did not change the *status* of all the opened land. Nor, given the lack of success of the 1872 Act, would the Tribe have agreed that the 1882 Act would constitute a complete cessation of a portion of its Reservation.

In sum, when drafting the 1882 Act, Congress had before it two very different models for dealing with Omaha lands: the model it had followed in adopting the 1854 and 1865 Treaties and the 1874 Conveyance, in which the Tribe agreed immediately to "cede" and "convey" to the United States its rights in return for a fixed sum; and the model it had followed in adopting the 1872 Act, in which land was opened for future sale to settlers at a minimum price. Congress chose the latter, and that choice should be given effect. See *Duncan Energy Co.* v. *Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1297 (8th Cir. 1994) ("It would be contrary to the principle of resolving ambiguities in favor of the Indians were we to conclude that Congress intended the same meanings for the vastly different language employed in these two documents affecting the Tribe."), cert. denied, 513 U.S. 1103 (1995).

2. This Court's prior decisions confirm that the 1882 Act should not be read as an expression of congressional intent to diminish the Omaha Reservation. In finding that Congress diminished a reservation or terminated its reservation status, the Court has relied on explicit language designed to achieve that purpose. Thus in *Yankton Sioux*, the relevant legislation called for the tribe to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to" the disputed land. 522 U.S. at 344 (citation omitted). The treaty at issue in *DeCoteau*

contained identical language. See 420 U.S. at 445. In *Rosebud Sioux*, the tribe signed an agreement promising to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest" to certain lands in exchange for $1,040,000. 430 U.S. at 591 & n.8. Although Congress did not approve that agreement, within a few years Congress passed legislation intended to ensure that the agreement's "purpose was carried forth and enacted." *Id.* at 592; see *id.* at 598 (statute intended to "accomplish the same result" as the earlier agreement). Those cases also all involved payment of a "sum certain" to the tribe in return for the abandonment of its land rights. See *Yankton Sioux*, 522 U.S. at 344 ("the United States pledges a fixed payment of $600,000"); *DeCoteau*, 420 U.S. at 441 ("$2,203,000 to pay the tribe for the ceded land"). This Court has explained that language of cession, when paired with the promise of a fixed payment, is "precisely suited" to alter the status of tribal lands, *DeCoteau*, 420 U.S. at 445, and that such statutes lie "[a]t one extreme" of the interpretive spectrum, *Solem*, 465 U.S. at 469 n.10.[4]

The express language of cession and conveyance relied upon in those decisions closely mirrors language used in the 1854 and 1865 Treaties and the 1874 Conveyance. See J.A. 1020 (1854 Treaty: "cede" and "forever relinquish all right and title"); J.A. 1015 (1865 Treaty: "cede, sell, and convey"); 1874 Conveyance 840 ("grant, bargain, sell and convey * * * all

---

[4] In *Hagen*, the Court relied on "operative language" providing that "'all the unallotted lands within [the] reservation shall be restored to the public domain.'" 510 U.S. at 412 (emphasis omitted). The Court said that language was "inconsistent with the continuation of reservation status." *Id.* at 414.

the right, title and interest"). All three also provided for payment of a fixed amount in return for the cession to the United States.

The 1872 and 1882 Acts, by contrast, contained no language of cession; did not provide for conveyance to the United States; and did not compensate the Tribe with payment of a sum certain. Instead, the operative language of those statutes—by authorizing the Interior Secretary to make land available for sale, with the proceeds placed to the credit of the Tribe—is functionally identical to the language at issue in cases where this Court has held that tribal lands were not diminished.

In *Solem*, for example, Congress "authorized and directed" the Secretary "to sell and dispose of" a portion of two reservations, with the proceeds to be placed into a Treasury account "to the credit of the Indians." 465 U.S. at 472-473 (citation omitted). The statute at issue in *Seymour* "authorized and directed" the Secretary "to sell and dispose of unallotted lands" and to "open [such lands] to settlement and entry." Act of Mar. 22, 1906, ch. 1126, §§ 1, 3, 34 Stat. 80-81. The statute also "provide[d] that the proceeds from the disposition of lands affected by its provisions [would] be 'deposited in the Treasury of the United States to the credit of'" the tribe. *Seymour*, 368 U.S. at 355. And in *Mattz*, Congress declared that the disputed lands would "be subject to settlement, entry, and purchase," with "the proceeds arising from the sale of [the] lands * * * to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians." 412 U.S. at 495 (citation omitted). Those statutes, like the 1872 and 1882 Acts, "merely open[ed] lands to settlement

* * * by establishing a fund dependent on uncertain future sales of [tribal] land to settlers." *DeCoteau*, 420 U.S. at 448. They accordingly lie "[a]t the other extreme" of the spectrum, where a court is bound to conclude that "the Act simply opened a portion of the * * * Reservation to non-Indian settlers and did not diminish the reservation." *Solem*, 465 U.S. at 469 n.10.

3. Petitioners identify no language demonstrating a clear intent to diminish the Omaha Reservation. And to the extent that petitioners even address the language of the 1882 Act (Br. 46-51), their arguments are unpersuasive.

First, petitioners contend (Br. 47) that the language opening the disputed area to settlement, by itself, constitutes evidence of intent to diminish. That assertion would hold true "only if continued reservation status were inconsistent with the mere opening of lands to settlement, and such is not the case." *DeCoteau*, 420 U.S. at 447. To the contrary, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." *Rosebud Sioux*, 430 U.S. at 586-587. Petitioners also ignore that the statutes at issue in *Solem*, *Mattz*, and *Seymour*—decisions in which this Court found no intent to diminish—all contained language opening a portion of tribal lands for sale and settlement. See pp. 24-25, *supra*. Indeed, as noted above, the Court has described statutes "authoriz[ing] the Secretary of the Interior 'to sell or dispose of' unallotted lands" as being "[a]t the other extreme"—*i.e.*, far removed from indicating an intent to diminish. *Solem*, 465 U.S. at 469 n.10 (citation omitted).

Second, petitioners observe (Br. 47) that, in the years following adoption of the 1882 Act, "Congress authorized the Secretary of the Interior, with the consent of the Tribe, to extend the non-Indian settlers' payment period on multiple occasions." Of course, "later enacted laws * * * do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998). Later-enacted legislation may bear, however, on the third *Solem* factor: "subsequent treatment of the * * * Reservation by Congress." 465 U.S. at 478. But as explained below, see pp. 38-39, *infra*, the statutes that petitioners cite in fact "suggest[] the continued reservation status of the disputed lands." Pet. App. 72.

Third, petitioners deem it "significant" (Br. 49) that Congress chose not to withhold a portion of the opened lands for continued use by the Tribe or to "carve out" mineral or land rights on its behalf. In *Solem*, petitioners note, the Court pointed to such features as supporting the conclusion "that the unallotted opened lands would for the immediate future remain an integral part of the * * * Reservation." 465 U.S. at 474. But the statutes in *Seymour* and *Mattz* contained no such reservation of rights; to the contrary, both statutes explicitly "provided for the sale of mineral lands" to non-members. *Seymour*, 368 U.S. at 354-355; see *Mattz*, 412 U.S. at 495 ("authorizing the sale of mineral, stone, and timber lands") (citation omitted). The Court nevertheless concluded in each case that the statutory language did not support a finding of diminishment. The Court's reliance in *Solem* on language reserving land and mineral rights in the opened area was necessary, moreover, to overcome "difficult" statutory language that "refer[red] to

the unopened territories as 'within the respective reservations thus diminished'" and permitted tribal members to harvest timber in the opened area "'only as long as the lands remain part of the public domain.'" 465 U.S. at 474-475; see *id.* at 475 ("[W]hen balanced against the Cheyenne River Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers, these two phrases cannot carry the burden of establishing an express congressional purpose to diminish"). The 1882 Act contains no such "difficult" language.

Finally, petitioners contend (Br. 49-50) that Congress had no cause to employ "explicit cession language in the 1872 and 1882 Acts" because "members of the Tribe did not reside [i]n the disputed area." That argument confuses two distinct concepts. "[C]ession" refers to "[t]he act of relinquishing *property rights*," *Black's Law Dictionary* 276 (10th ed. 2014) (emphasis added), and does not require the person ceding his right to land to physically inhabit the area beforehand or to vacate it afterwards. In addition, although members of the Omaha Tribe did not reside west of the railroad right of way prior to passage of the 1882 Act, they "continued to hunt on the prairies west of Logan Creek and considered the region to be an integral part of their reservation." J.A. 898; see *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835) (considering Indian title in Florida: "[T]heir hunting grounds were as much in their actual possession as the cleared fields of the whites."). Had Congress intended to divest the Tribe entirely of those traditional rights, rather than to sell the land on the Tribe's behalf, it would have employed clear language of cession. And petitioners' argument (Br. 51)

that Congress was waiting "to transfer full and complete title" to the land until "the land was either allotted to tribe members or settled upon and sold to non-Indians" is beside the point. A reservation's borders do not depend on the title status of individual plots within it: "Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

B. The Historical Context and Legislative History Of The 1882 Act Do Not Demonstrate An Intent To Diminish The Omaha Reservation

The text of the 1882 Act, which is "[t]he most probative evidence of congressional intent," *Solem*, 465 U.S. at 470, makes clear that Congress did not intend to diminish the Omaha Reservation. That alone should suffice. See *Hagen*, 510 U.S. at 411 ("[T]he statutory language must establish an express congressional purpose to diminish.") (brackets and citation omitted); *Solem*, 465 U.S. at 470 ("Our analysis of surplus land Acts requires that Congress clearly evince an intent to change boundaries before diminishment will be found.") (ellipses, citation, and internal quotation marks omitted).

In determining whether a reservation has been diminished, the Court has also considered extra-textual sources such as legislative history, but those sources may support diminishment only where they "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471; see *Yankton Sioux*, 522 U.S. at 351

("[U]nequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished."). No such "unequivocal" evidence exists in this case.

1. In December 1881, Alice Fletcher (who later administered the 1882 Act's allotment provisions, see p. 6, *supra*) met with Omaha tribal leaders, "who asked her for a 'strong paper' or act of Congress to guarantee their lands and prevent their removal to Indian Territory." J.A. 908. Fletcher interpreted that request to mean "they were asking for legal title to their allotments," and she "helped them draft and send a petition to Congress." J.A. 908-909. The petition, submitted on behalf of 53 members of the Tribe, asked Congress to grant "clear and full title" to their allotted lands. S. Misc. Doc. No. 31, 47th Cong., 1st Sess. 1 (1882); see *id.* at 1-2.

Meanwhile, Senator Saunders introduced a bill providing for the sale of 50,000 acres of Omaha land. The bill stated that the land opened for sale would be "separated from the remaining portion of [the] reservation by a line running * * * from north to south." S. 200, 47th Cong., 1st Sess. 1 (1881). That language directly mirrored language in the 1872 Act. J.A. 631. When the bill was reported by the Committee on Indian Affairs (now numbered as S. 1255), Senator Saunders explained that the bill would "authorize[] the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha reservation." J.A. 644; see S. 1255, 47th Cong., 1st Sess. 1 (1882); see also J.A. 909. A lengthy debate followed that touched on a number of topics, most pointedly a provision that would have exempted "patents issued to Indians" from "incumbrance and

taxation" by the State. J.A. 647; see J.A. 647-678. After a number of amendments were added to the bill, see, *e.g.*, J.A. 910, it was passed by the Senate on April 20, 1882. J.A. 916.

The Senate bill was referred to Committee in the House of Representatives. J.A. 916. When it was returned to the House floor, it had been almost entirely rewritten. Among other things, the House version provided for the allotment of land to members of the Tribe, and it used the railroad right of way—rather than the north-south line employed by the 1872 Act—to mark the area opened for sale. It also eliminated the statement that the area opened for sale would be "separated" from the rest of the Reservation. J.A. 1308; see J.A. 1307-1316 .

During the ensuing debate in the House, a dispute arose among several Representatives about whether the "best lands" on the Reservation lay east or west of the right of way. 13 Cong. Rec. 6540 (1882) (Rep. Scales); see *id.* at 6540-6541 (Reps. Haskell, Scales, and Valentine). Representative Holman resolved the impasse by offering an amendment allowing tribal members to choose allotments "in any part of [the] reservation either east or west of [the railroad] right of way." *Id.* at 6541; see J.A. 925. The amended bill was passed by the House on July 27, 1882. J.A. 925-926. The Senate approved the House version without change, and President Arthur signed it into law on August 7, 1882. J.A. 926.

2. The negotiations and legislative discussions leading up to adoption of the 1882 Act do not "reveal a contemporaneous understanding that the proposed legislation" was intended to "modif[y] the reservation." *Yankton Sioux*, 522 U.S. at 352. Instead, to the

extent that they shed any light, it is to confirm the Act's express goals: to make land available for sale, to raise money for the Tribe, and to provide members of the Tribe with "clear and full title" to their allotted land. Pet. App. 64; see *id.* at 63-65. The record is devoid of any "specific discussion of how, if at all, the 1882 Act would impact Omaha Reservation boundaries or whether the Act would transfer the Omaha Indians' tribal sovereignty in a particular geographic area." *Id.* at 65; see *ibid.* (finding no evidence that Congress intended to "diminish or alter the boundaries of the Omaha Reservation, as opposed to merely authorize the sale of reservation land to non-Indian settlers for the Omaha Tribe's benefit").

The absence of any discussion of diminishment here stands in stark contrast to decisions in which this Court has found evidence of a widely held understanding that a reservation's borders were to be altered. In *Rosebud Sioux*, for example, a federal negotiator told the tribe that its cession of certain lands "will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 430 U.S. at 591-592 (citation omitted). Similarly, the federal negotiator in *Hagen* informed the tribe that "congress has provided legislation which will pull up the nails which hold down that [boundary] line and *after next year there will be no outside boundary line to this reservation*." 510 U.S. at 417. In *Yankton Sioux*, a report from the Yankton Commission "signaled [the Commissioners'] understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation," and tribal leaders "concurred" in that understanding in a letter to Congress. 522 U.S. at 353.

Petitioners do not identify any similar discussion of anticipated changes to the boundaries of the Omaha Reservation. Instead, petitioners point (Br. 5-6) to two remarks made on the Senate floor that supposedly support their position. Petitioners' "reliance on * * * comments made on the floor of the [Senate] is not well placed," because "the [House] version" of S. 1255 "was substituted for that of the [Senate]." *Mattz*, 412 U.S. at 503-504. But even on their own terms, those statements do not have the significance that petitioners ascribe to them.

First, petitioners repeatedly refer (Br. 5-6, 42, 45) to a statement by Senator Ingalls objecting to language exempting land held by tribal members from state taxation. Senator Ingalls disputed Congress's constitutional authority to achieve that result and proposed that the taxation language be stricken. J.A. 647-648. A long debate on the tax question followed. See, *e.g.*, J.A. 647-679. During that debate, Senator Ingalls stated that the bill "practically breaks up that portion at least of the reservation which is to be sold." J.A. 647. He also stated that the lands presently occupied by members of the Tribe, as to which the bill would allow them to acquire title, "are segregated from the remainder of the reservation." *Ibid.*

Those statements cannot bear the weight petitioners place on them. The statement by Senator Ingalls that S. 1255 "*practically* breaks up" the Reservation is, as it purports to be, a statement about the bill's practical effect, not its consequences for the Reservation's formal boundaries. And in referring to lands occupied by tribal members as being "segregated," Senator Ingalls was addressing the question whether the United States would retain jurisdiction to exempt

land held by individual allottees from state taxation. Senator Ingalls was firmly of the view that it would not. See J.A. 647 ("The lands that they occupy are segregated from the remainder of the reservation, and the allottees receive patents to the separate tracts, so that the interest and control and jurisdiction of the United States is absolutely relinquished."); see also J.A. 648 ("The question is whether this land, being so held, the Government having relinquished its jurisdiction, it is competent for Congress" to "exempt [it] from taxation."). Senator Ingalls was suggesting a distinction between lands owned by the Tribe collectively (which could be exempted from state taxation) and those held by individual members based on "private title from the Government" (which he thought could not be exempted). J.A. 647. He was not distinguishing between lands to be opened for sale and those unavailable for sale.[5]

Second, petitioners rely (Br. 42) on a statement by Senator Dawes, who expressed concern that the sale of the lands "would leave the reservation too small." J.A. 683. As this Court has recognized, statements of that type often "allud[e] to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers," rather than "the reduction that a complete cession of tribal interests in the opened area would precipitate." *Solem*, 465 U.S. at

---

[5] For the same reason, petitioners err in relying on the phrase "the interest and control and jurisdiction of the United States is absolutely relinquished." Br. 31 (emphasis omitted). The entire sentence makes clear that Senator Ingalls was arguing that the United States would lose jurisdiction over "the allottees [who] receive patents to the[ir] separate tracts." J.A. 647. That statement had nothing to do with the land to be opened for sale.

478. Indeed, in *Solem* the Court refused to give weight to statements in "[b]oth the Senate and House Reports [that] refer to the 'reduced reservation' and state that 'lands reserved for the use of the Indians upon both reservations as diminished are ample for the present and future needs of the Indians of the respective tribes.'" *Ibid.* (ellipses and citations omitted); see *id.* at 475 n.17. The Court considered those statements to be "isolated and ambiguous" and concluded that "it [wa]s impossible to infer from" them "a congressional purpose to diminish the Cheyenne River Sioux Reservation." *Id.* at 478. In any event, the context here makes clear that Senator Dawes was addressing the acreage available to the Omahas to select allotments for themselves and the acreage left over for future allotments to their children. J.A. 683-684 (referring to the "increase of numbers as might probably be expected in the next twenty-five years"). Nothing indicates that he was referring instead to "a complete cession of tribal interests." *Solem*, 465 U.S. at 478.

3. Petitioners also rely on the 1872 Act and the circumstances surrounding its enactment, which, petitioners contend (Br. 40), are "very much a part of the legislative history of the 1882 Act." But considering the 1882 Act in the context of the 1872 Act only strengthens the conclusion that Congress did not intend to diminish the Omaha Reservation.

First and foremost, as noted above, it is undisputed that the 1872 Act did not diminish the Reservation. See pp. 20-21, *supra*. The debate on the 1882 Act makes clear, moreover, that Congress viewed the Reservation's boundaries as including the land west of the railroad right of way. See, *e.g.*, J.A. 459 ("[T]he

Omaha Indians have the whole reservation."); J.A. 644 ("The bill authorizes the sale of not exceeding fifty thousand acres, to be taken from the west part of the Omaha reservation."); J.A. 655 ("[U]nderlying all this," based on "treaty stipulations with these Indians," is the fact "that any one of them can go on any part of all the present reservation."); J.A. 707 ("[T]he Sioux City and Nebraska Railroad * * * runs through their reservation."). Therefore, if petitioners are correct (Br. 41) that "[t]he 1882 Act was nearly identical to the 1872 Act, both in its terms and objectives," then the effect of each Act on the Reservation's boundaries—or lack thereof—should be the same.[6]

Petitioners nevertheless point to features of the 1872 Act and its adoption that they argue support a finding of congressional intent to diminish. Petitioners rely (Br. 40) on the 1872 Act's provision for the survey of 50,000 acres "to be taken from the western part" of the Reservation and "to be separated from the remaining portion of [the] reservation by a line running * * * from north to south." J.A. 631. The word "separated" in the 1872 Act did no more than mark the boundary between land made available for sale and land not thus available. But even assuming

---

[6] For the same reason, petitioners fail in their effort (Br. 39) to analogize the relationship between the 1872 and 1882 Acts to the relationship between the earlier and later statutes relied upon in *Rosebud Sioux* and *Hagen*. In *Rosebud Sioux*, a 1901 agreement signed by the tribe but not approved by Congress had an "unmistakable baseline purpose of disestablishment" that "was carried forth and enacted" in a 1904 statute. 430 U.S. at 592. In *Hagen*, a 1902 statute established a "baseline intent to diminish" that "survived the passage of" a statute adopted three years later. 510 U.S. at 415. Here, by contrast, if the 1872 Act established a "baseline purpose" or "intent," it was one of non-diminishment.

that the phrase "'separated from the remaining portion of [the] reservation'" had "any legal relevance, then equally significant is Congress's decision to remove the word and phrase from the 1882 Act." Pet. App. 67. As noted above, the House of Representatives substantially rewrote the bill that became the 1882 Act and changed a number of its provisions—including the phrase relied upon by petitioners. See J.A. 1307-1308; see also p. 30, *supra*.

Petitioners also err in relying (Br. 39-40) on a statement, made in January 1872 by the Commissioner of Indian Affairs, that "the general idea of diminishing these reservations for the purpose of securing higher cultivation of the remaining lands, is consonant with sound policy." J.A. 194. As this Court has explained, at that time, "'diminished' was not yet a term of art in Indian law." *Solem*, 465 U.S. at 475 n.17. The Commissioner "may well have been referring to diminishment in common lands and not diminishment of reservation boundaries." *Ibid.* In *Solem*, the very statute at issue referred to "'the reservation thus diminished'" and also referred to opened lands as being "'part of the public domain.'" *Id.* at 475. Yet the Court deemed those to be "isolated phrases" that were "hardly dispositive." *Ibid.* In any event, even if the Commissioner's remarks provide meaningful context for interpreting the 1872 Act, that Act did not use any form of the word "diminish," and neither did the 1882 Act.

In sum, petitioners have failed to identify evidence that would "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Solem*, 465 U.S. at 471. Nor have petitioners

explained how the 1872 Act, which admittedly did not change the boundaries of the Omaha Reservation, supports their reading of the 1882 Act.

C. The Subsequent Treatment Of The Area And The Pattern Of Settlement Do Not Support A Finding Of Diminishment

Where, as here, "both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts are "bound by [their] traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Solem*, 465 U.S. at 472. Nevertheless, the Court may look to "the subsequent treatment of the area in question and the pattern of settlement there," to the extent that they shed light on the "touchstone" of the diminishment inquiry—namely, "congressional purpose." *Yankton Sioux*, 522 U.S. at 343-344; see *Solem*, 465 U.S. at 472 ("one additional clue as to what Congress expected").

Petitioners no longer argue, as they did in seeking this Court's certiorari review, that the decisions by the courts below in this case "preclude[d] proper consideration of * * * the jurisdictional history and subsequent treatment of the [disputed] area." Pet. 10; see Pet. i, 9. That concession is wise. The district court found, and the court of appeals agreed, that "the Omaha Reservation has been described, treated, and mapped inconsistently by the State of Nebraska, its agencies, and the United States." Pet. App. 72. The historical record, while "rife with contradictions and inconsistencies," *Yankton Sioux*, 522 U.S. at 356, generally supports the conclusion that Congress in-

tended the 1882 Act to leave the Reservation's borders intact.

1. Congress

The most probative post-enactment evidence of congressional intent is "Congress' own treatment of the affected areas, particularly in the years immediately following the opening." *Solem*, 465 U.S. at 471. In this case, Congress passed several statutes modifying the 1882 Act, all of which demonstrate its understanding that the 1882 Act had not diminished the Omaha Reservation.

The first statute, passed only three years after the 1882 Act, authorized the Secretary of the Interior to extend the time period for settlers to pay for their land purchases. Notably, the statute required the Secretary to obtain "the consent of the Indians," suggesting that Congress understood the Tribe as retaining an interest in the area that had been opened for sale. 1885 Act, 23 Stat. 370. The statute also opened for sale "that portion *of [the] reservation* in township twenty-four, range seven east." *Ibid.* (emphasis added). The 1882 Act had identified that entire block—which was divided in half by the railroad right of way—as eligible for sale if any of it remained unallotted on June 1, 1885. J.A. 229; see J.A. 1306 (map); see also note 1, *supra* (defining township and range).

Over the next decade, Congress passed four more statutes extending the time period for payment by settlers. Each time, Congress referred to the lands opened for purchase as "Omaha lands" or "on the Omaha Indian Reservation." 1886 Act, 24 Stat. 214 ("who have settled or shall settle upon said Omaha lands"); 1888 Act, § 2, 25 Stat. 150 ("land sold on

Omaha Indian Reservation"); 1890 Act, § 1, 26 Stat. 329 ("land sold on the Omaha Indian reservation"); 1894 Act, 28 Stat. 276 ("land sold on the Omaha Indian Reservation"). The House Report on the 1890 extension explained that an earlier version of the legislation had contained a provision that would have authorized Nebraska to tax the purchased lands immediately, prior to issuance of a patent in fee. The President vetoed that version due to concern that the state tax provision "might endanger the title of the Indians to the land in case of sale for taxes," and so Congress removed the objectionable provision. C.A. App. 2410 (H.R. Rep. No. 2684, 51st Cong., 1st Sess. (1890)). And the 1894 Act, like the 1885 extension, provided that the extension would not take effect unless "the consent thereto of the Omaha Indians shall be obtained." 28 Stat. 277. Those statutes all strongly indicate Congress's understanding "that the opened area was still part of the reservation." *Solem*, 465 U.S. at 479.

Petitioners nevertheless contend (Br. 47-48) that the 1888 extension statute supports their view, because Congress specified that, upon default for nonpayment, "a settler's tract [would] be sold at public auction, not revert back to the Tribe." § 3, 25 Stat. 151. But the purpose of the 1882 Act was to generate money for the Tribe's benefit; that goal required the lands to be resold, not returned to the Tribe. The 1888 Act specified, moreover, that "the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of [the] Omaha Tribe of Indians." *Ibid.* As the district court observed, "[u]nder the 1888 Act, the United States merely con-

tinued to act as trustee for the Tribe so the Tribe gained the financial benefit of the sale." Pet. App. 71.

2. The Department of the Interior

Treatment of the disputed area by the Department of the Interior shortly after passage of the 1882 Act is mixed, but it also tends to support a finding that the Reservation was not diminished. In 1884, federal cartographers working for the Office of Indian Affairs mapped "the Boundary Lines of the Omaha and Winnebago Ind[ian] Res[ervation] in Nebraska." J.A. 1129 (capitalization altered); see J.A. 968. Their map shows the Omaha Reservation as originally created in 1854, minus the areas ceded for use by the Winnebago Tribe in 1865 and 1874, but undiminished by the 1882 Act. *Ibid.* Those borders are also consistent with reports subsequently submitted by the Omaha and Winnebago Agency, which describe the Reservations as "extend[ing] west 30 miles" from the Missouri River—that is, from the River to the Omaha Reservation's traditional western border. J.A. 798 (1890 Report); J.A. 817 (1892 Report); J.A. 830 (1897 Report); J.A. 1100 (1899 Report); see J.A. 495 (1885 Report) ("25 miles").[7] Finally, in June 1900, Willis Van Devanter, then Assistant Attorney General for the Interior Department and later a Member of this Court, submitted an opinion to the Secretary addressing whether settlers who purchased lands under the 1882 Act qualified as "settlers under the homestead

---

[7] The Omaha Reservation's original western border, as established in an 1855 boundary survey report, is almost exactly 30 miles from the Missouri River at the Reservation's widest point (along its southern border). J.A. 127-128; see Neb. Rev. Rul. 99-92-1 (Mar. 6, 1992) (Omaha Reservation's southern border is 30.5 miles, "as established by [the] 1854 treaty").

laws of the United States." 30 Pub. Lands Dec. at 83. His opinion concludes that they did not, and it refers to them as "settlers under said section [*i.e.*, Section 2 of the 1882 Act] on lands embraced in the Omaha reservation." *Ibid.*

In response, petitioners offer three general sources of evidence purporting to indicate that "the United States * * * had absolutely relinquished all jurisdiction and control" over the disputed area. Br. 34. First, petitioners rely (Br. 13, 34-36) on three Interior Department maps that depict dozens of different Indian reservations throughout the United States on a single, nationwide map. J.A. 1298-1300. Those maps, on which the Omaha Reservation is barely visible, do not purport to show formally determined legal boundaries, and it is unclear what evidence was considered to generate them and what purpose they were intended to serve. Certainly they are less probative than the 1884 Office of Indian Affairs map of the Omaha Reservation itself.

Second, petitioners rely (Br. 12, 34-36) on Interior Department reports in which the acreage of the Omaha Reservation is listed. Petitioners contend (Br. 34) that the acreage figures are so low as to suggest that the disputed area was not included in the total. But those acreage figures are not persuasive for several reasons. As an initial matter, the figures do not indicate whether they refer to the total land within the Omaha Reservation's borders, or only to the land occupied by the Tribe. Moreover, the Interior Department's "[o]fficial reports from 1874 onward consistently treated the Omaha Reservation as having been diminished by 50,000 acres," J.A. 360 (petitioners' expert report), even though the 1872 Act did not

diminish the Reservation, see pp. 20-21, *supra*. Thus the 1874 report states that "[b]y the provision of the act of June 10, 1872, 49,762 acres have been appraised for sale in trust for said Indians, leaving 143,225 acres as their diminished reserve." J.A. 504. Subsequent reports carry forward the same deduction. See, *e.g.*, J.A. 511, 517, 522. Finally, most of the reports also deducted the acreage of land allotted to members of the Tribe. See, *e.g.*, J.A. 517, 522, 525, 530-531. As a result, for example, the 1898 report lists the Reservation's "Area in acres" as 64,558, because that was the area that remained unallotted. J.A. 517.

Third, petitioners rely (Br. 11, 34-35) on various statements by federal Indian agents, some of which are inapposite. For instance, one agent simply stated, in regard to the Winnebago and Omaha Reservations, that "settlers surrounding these reservations are sober, industrious, intelligent, and frugal farmers." J.A. 490; cf. Pet. Br. 11. Other statements, which describe the Reservation as lying east of the railroad, appear to be taken primarily from individual letters, most of which are not themselves in the record. See J.A. 207, 605-607. Those statements are inconsistent with the Omaha and Winnebago Agency reports described above. The statements appear to be "merely passing references," and "not deliberate expressions of" the Executive Branch's "conclusions about congressional intent in [1882]." *Hagen*, 510 U.S. at 420 (citation omitted).

3. The State of Nebraska

Several contemporaneous state maps depict the disputed area as remaining within the Omaha Reservation's boundaries. An 1885 map, which was published in the Official State Atlas of Nebraska, shows

the area west of the right of way as being contained within the Reservation. J.A. 1306.[8] So does a detailed "outline map" for Cuming County from the 1908 Standard Atlas. J.A. 1303.[9] Maps of township plats within Cuming County depict land ownership in the western area of the Reservation—including tracts occupied by Indian allottees and non-Indian settlers, each identified by name—all bounded by the original, undiminished Reservation boundary lines. J.A. 1304 (Grant Township)[10]; J.A. 1305 (Bancroft Township).[11]

Perhaps even more significant, in 1889, "the Nebraska Legislature enacted legislation defining the geographical boundaries of Thurston County." J.A. 210. As a reference point, the legislature used "the south line of the Omaha Indian reservation, as originally surveyed." J.A. 210-211. In 1922, the legislature defined Thurston County's western boundary as running "along the Winnebago and Omaha Indian reservation line." J.A. 211. That definition, relying on the Reservation's traditional western border, remains in use today. See Neb. Rev. Stat. Ann. § 22-187 (LexisNexis 2011) ("west line of the Winnebago and Omaha Indian reservations").

---

[8] Several of the maps in the Joint Appendix are available at higher resolution online. The 1885 map cited here is available at http://www.davidrumsey.com/maps11305-28917.html.

[9] http://www.loc.gov/resource/g4193cm.gla00166/?sp=5. When the map is magnified, the phrase "West Boundary Omaha Res." can be read along the Reservation's historical border.

[10] http://www.loc.gov/resource/g4193cm.gla00166/?sp=15.

[11] http://www.loc.gov/resource/g4193cm.gla00166/?sp=22.

4. The pattern of settlement

Petitioners rely heavily (Br. 24-30) on the fact that the population of the disputed area has been at least 90% non-Indian since settlers moved into the area following the 1882 Act. The pattern of settlement "is the least compelling [evidence of diminishment] for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet [the Court has] repeatedly stated that not every surplus land Act diminished the affected reservation." *Yankton Sioux*, 522 U.S. at 356. In any event, the circumstances here present a picture that is, as the district court found, "mixed." Pet. App. 76.

In 1882, no members of the Omaha Tribe were known to be living on the lands west of the right of way, lands the Tribe used primarily as a hunting ground. J.A. 898. Therefore, because several members of the Tribe selected allotments west of the right of way under the 1882 Act, that Act resulted in an *increase* in the Omaha population in the disputed area. Indeed, the tribal population west of the right of way more than quadrupled between 1900 and 1910, albeit only to a total of 72. J.A. 366. Demographics east of the right of way—that is, in the area that petitioners admit remained part of the Reservation—changed even more significantly. Non-Indians attained a majority no later than 1900; by the time the last parcel in the disputed area had been sold to a settler in 1913, see J.A. 206, non-Indians made up more than three-quarters of the population east of the right of way, J.A. 366. In sum, following passage of the 1882 Act, the Omaha population west of the right of way increased slightly, and the percentage of Oma-

has east of the right of way decreased substantially. The circumstances here are thus quite different from other decisions cited by petitioners (Br. 30), in which a significant, existing Indian population was displaced by settlers in the area opened for settlement.

It should be emphasized, however, that members of the Omaha Tribe have had a long and prominent presence west of the right of way. Many visited, resided in, and regularly conducted business in the newly established Village of Pender. J.A. 952. Tribal members also played prominent roles in the town's early settlement. Thomas Sloan, an attorney and member of the Omaha Tribe, maintained a residence and a law office in Pender; he also served as the Mayor of Pender, Surveyor of Thurston County, and Justice of the Peace. J.A. 952-953. Hiram Chase, another tribal member, resided and practiced law in Pender, where his children attended public schools; he also served as Thurston County Attorney for eight years before being elected as County Judge. J.A. 953. Sloan and Chase also argued cases in this Court. *United States* v. *Chase*, 245 U.S. 89 (1917); *Hallowell* v. *Commons*, 239 U.S. 506 (1916); *Hallowell* v. *United States*, 221 U.S. 317 (1911).

5. Treatment of the area from 1961 to the present

Much of petitioners' argument (Br. 17, 25, 28, 31-33, 36) focuses on present-day events and circumstances relating to the disputed area. While those come far too late to provide meaningful evidence of what Congress intended in 1882, they nevertheless also demonstrate the view, predominant among both the federal and state governments, that the disputed area lies within the Omaha Reservation.

a. The Interior Department has determined on multiple occasions that the boundaries of the Omaha Reservation were not diminished by the 1882 Act. A historical summary in 1961 stated that the 1865 Treaty and the 1874 Conveyance "are the only changes effected in the boundaries of the Omaha Reservation since its inception. The later enactments authorizing sale of various lands included within these boundaries are not considered to have had the effect of terminating Federal jurisdiction over them." J.A. 1071. A 1999 memorandum from the Aberdeen Area Director similarly found that the Reservation boundaries "have not been changed or altered" since the 1874 Conveyance. J.A. 1131. A lengthy analysis by the Interior Field Solicitor in 2008 concluded that the 1882 Act "does not evidence a diminishment of the reservation boundaries." J.A. 1248; see J.A. 1195-1249. Most recently, the Interior Associate Solicitor for Indian Affairs, in a thorough and authoritative memorandum prepared in 2012, confirmed that "the western boundary of the Omaha Reservation has not been diminished." J.A. 284; see J.A. 234-284.

One deviation from that consistent view, relied upon by petitioners (Br. 36), is a letter from the Twin Cities Field Solicitor in 1989. J.A. 1182-1194. The letter acknowledged that "on the basis of the [statutory] language alone diminishment was not the intent of Congress." J.A. 1187 (emphasis omitted). It nevertheless stated that the Reservation had undergone "de facto diminishment." J.A. 1190. But in addition to its legal shortcomings, the 1989 letter was based in part on an inaccurate factual record, including the erroneous statement that "no Indian trust allotments were made on lands lying west of the * * * right of way."

J.A. 1189 (emphasis omitted). The Interior Department explicitly disclaimed that analysis in 2012. J.A. 1250 ("The June 27, 1989 letter is hereby withdrawn and is not to be relied upon.").

b. Federal maps have varied in their depiction of the Omaha Reservation, but they primarily show it undiminished. Recent Interior Department maps show the disputed area as being within the Reservation's boundaries. J.A. 1133 (1995 map); J.A. 1134 (1999 map). The 2000 U.S Census Bureau map of Pender also locates the town within the Reservation's western boundary. J.A. 1137.[12] A 1994 Bureau of Indian Affairs map, while showing some of the disputed area as extending outside the Reservation boundary, depicts Thurston County and Pender as lying within it. J.A. 1130. Petitioners rely (Br. 36) on a 1964 map from the Aberdeen Area Office, which includes a note from an unknown author stating that the Reservation was diminished. J.A. 562-564. No explanation is provided for that statement, and the area described as having been diminished does not correspond to the area opened to settlement by the 1882 Act.

c. In addition, the State of Nebraska has formally relinquished to the United States its criminal jurisdiction over the Omaha Reservation in a manner that recognizes the Reservation's undiminished western boundary. In 1953, Congress enacted a statute, commonly known as Public Law 280, which trans-

---

[12] U.S. Census Bureau, *Census 2000 Block Map: Omaha Reservation* (2000), http://www2.census.gov/geo/maps/blk2000/AIANHH/AIR_Federal/2550_Omaha/CBN2550_B01.pdf. See U.S. Census Bureau, *Census 2000 Block Map: Pender Village* (2000), http://www2.census.gov/geo/maps/blk2000/st31_Nebraska/Place/3138750_Pender/CBP3138750_001.pdf.

ferred to certain States the federal government's civil and criminal jurisdiction over Indian country within those States; Nebraska was a so-called P.L. 280 State. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified at 18 U.S.C. 1162; 28 U.S.C 1360). In 1968, Congress enacted a law permitting any of the P.L. 280 States to "retroce[de]" to the federal government "all or any measure of" jurisdiction previously transferred. 25 U.S.C. 1323. In 1969, the Nebraska Legislature "retrocede[d]" to the United States "all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska," with the exception of certain offenses involving motor vehicles. J.A. 1123; see J.A. 1122-1124. The Interior Department accepted that retrocession in October 1970. 35 Fed. Reg. 16,598 (Oct. 24, 1970). Of particular significance, the "Notice of Acceptance of Retrocession of Jurisdiction" describes the affected area as "Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County," which it defines by reference to "the west boundary line of the Omaha Indian Reservation *as originally surveyed.*" *Ibid.* (emphasis added); see J.A. 212-213.

Petitioners suggest (Br. 17, 32-33) that the State of Nebraska had a different view of the retroceded area, but that is incorrect. State officials have acknowledged that the disputed area was properly included in the State's retrocession of authority. In 1976, a Senate committee considered legislation to provide for retrocession without state consent. During hearings on the legislation, state officials repeatedly and without contradiction stated their understanding that the entirety of Thurston County—the western boundary

of which is coterminous with the Reservation's undiminished western boundary—is Indian country, and thus was included in the retrocession. See *Indian Law Enforcement Improvement Act of 1975: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 471 (1976) (*Hearings*) (Nebraska Assistant Att'y Gen.) ("All of Thurston County is within the exterior boundaries of the two reservations."); *id.* at 573 (Thurston Cnty. Att'y) ("The entire county is within the boundaries of the two reservations."). [13] The Nebraska Legislature has never sought to alter the geographic scope of the jurisdiction retroceded, even as it has considered legislation that would expand the retrocession to include motor vehicle offenses. See Leg. Res. 234, 100th Leg., 2d Sess. (Neb. 2008).

d. The Nebraska Department of Revenue has repeatedly issued revenue rulings stating that the disputed area lies within the Omaha Reservation. In 1976, the Department of Revenue was asked for advice "as to what constitutes a Nebraska Indian reservation for tax exemption purposes." Neb. Rev. Rul.

---

[13] The Nebraska Assistant Attorney General testified that, prior to the transfer of jurisdiction under P.L. 280, the State may have "mistakenly" exercised criminal jurisdiction over the entire Omaha Reservation, "apparently concurrently with the Federal courts." *Hearings* 471. He explained that the State had done so believing it had gained jurisdiction "over Indians on the reservation" after Omaha lands were allotted and patented to Indians pursuant to the 1882 Act, *ibid.*—a theory that would have applied east as well as west of the right of way. He also acknowledged that this theory of state jurisdiction was rejected in *Omaha Tribe* v. *Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), aff'd, 460 F.2d 1327 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973). *Hearings* 471.

99-76-6 (Oct. 13, 1976).[14] It responded that such a reservation comprises "[a]ll land within the original boundaries of any Nebraska Indian reservation which has not been specifically removed by an act of Congress or Executive Order." *Ibid.* The ruling goes on to describe the area encompassed within the Omaha Reservation, using its historical western boundary, and it specifies that Pender is "located within the boundar[y]" of the Reservation. *Ibid.* Subsequent rulings repeated that view. See Neb. Rev. Rul. 99-92-1 (Mar. 6, 1992)[15]; Neb. Rev. Rul. 99-90-1 (Apr. 3, 1990)[16]; Neb. Rev. Rul. 99-89-2 (Sept. 29, 1989).[17] In 2005, the Department of Revenue issued a one-sentence ruling stating that the 1992 ruling had been "rescinded." Neb. Rev. Rul. 99-05-01 (Sept. 29, 2005).[18]

e. In 2005, the State of Nebraska entered into an agreement with the Omaha Tribe for the collection of motor fuel taxes within the Reservation. J.A. 1145-1158; see Neb. Rev. Stat. Ann. § 66-741 (LexisNexis 2014) (authorizing tax-sharing agreements for sales "on a federally recognized Indian reservation"). The agreement exempts sales within the Reservation from state fuel taxes and instead imposes a tribal tax, which the State agrees to collect and divide with the Tribe. J.A. 1151 (Tribe keeps 75% of motor vehicle fuel tax and 60% of diesel fuel tax). The agreement applies only to sales "within the boundaries of [the Omaha]

---

[14] Available on WestlawNext at RIA SLT NE 10/13/1976.

[15] Available on WestlawNext at RIA SLT NE NE05199203060008.

[16] Available on WestlawNext at RIA SLT NE NE05199004030008.

[17] Available on WestlawNext at RIA SLT NE NE05198909120002.

[18] http://www.revenue.nebraska.gov/legal/rulings/rr990501_rescind.pdf.

Reservation," J.A. 1150, although it does not specify those boundaries.

In 2006, Nebraska officials were sued by a group of motor fuel sellers and purchasers located in Pender who objected to the tribal tax. See Compl. at ¶¶ 1-14, 34, *Lamplot* v. *Heineman*, No. 4:06-cv-03075, (D. Neb. Mar. 28, 2006). The plaintiffs alleged that the State's tax-sharing agreement with the Tribe could not be enforced within Pender because, "[a]s a result of the 1882 Act, Pender is not part of" the Omaha Reservation. *Id.* at ¶ 72. The State moved to dismiss, arguing among other things that, should plaintiffs prevail, "there would be a diminishment of the tribal reservation." Doc. No. 14, at 2 (May 18, 2006); see Doc. No. 24, at 4 (July 20, 2006) ("Plaintiffs have alleged that Pender is not located on a 'federally recognized Indian reservation' as required by the Motor Fuel Statute. * * * Plaintiffs contend that Pender is not part of the reservation. Those assertions have no factual basis.") (citation omitted).[19]

f. Petitioners contend that "[f]rom 1882 until 2006, the State of Nebraska consistently exercised jurisdiction over Pender without any dispute or objection from the Omaha or the United States," and that "all governmental services are provided by state and local agencies." Br. 25, 33 (emphasis omitted). The joint appendix citations that follow fail to identify any exer-

---

[19] The State ultimately declined to take a position in the litigation regarding whether "Pender, NE is within the Omaha Tribe's reservation boundaries." Doc. No. 31, at 2 (Oct. 23, 2006). The case was dismissed by the district court for lack of subject-matter jurisdiction and for failure to join an indispensable party, Doc. No. 36, at 7, 13 (Nov. 29, 2006), and the parties settled while the appeal was pending, Doc. No. 43, at 1 (Feb. 28, 2007).

cise of jurisdiction before 1999; and the State's right in the disputed area to provide services to non-Indians and Indians alike, and to exercise criminal jurisdiction and civil regulatory and adjudicatory jurisdiction over non-Indians, has never been contested.[20] Nor would those exercises of state authority conflict with the Tribe's authority, in the disputed area, to exercise jurisdiction over its own members and to exercise the limited jurisdiction over non-members on non-Indian fee lands that it has retained as a matter of inherent authority or that has been authorized by Congress. See pp. 8-9, *supra*.

In 1999, federal officials indicted a member of the Omaha Tribe on charges of using a dangerous weapon to intimidate and interfere with a law enforcement officer, but the indictment was dismissed and he was released into the custody of Thurston County, where he was charged with murder. See *United States* v. *Picotte*, No. 8:99-cr-00159-JFB (D. Neb.) (dismissed Oct. 6, 1999); J.A. 145-152. Nothing in the record reflects why the decision to transfer the defendant to state custody was made.

In 2007, the Nebraska Attorney General issued an opinion stating that the Omaha Reservation was diminished as a consequence of the 1882 Act, the 1912 Act, "and the subsequent treatment and character of the disputed territory." Letter from Jon Bruning, Neb. Att'y Gen., to Hobert Rupe, Exec. Dir., Neb. Liquor Control Comm'n (Feb. 15, 2007).[21]

---

[20] By virtue of the 1969 retrocession, the federal government would have criminal jurisdiction over offenses committed by non-Indians against Indians. See 18 U.S.C. 1162.

[21] Available at https://ago.nebraska.gov/_resources/dyn/files/625522zfb113cfe/_fn/07005_2-15-07.pdf.

II. PRESENT-DAY EXPECTATIONS CANNOT JUSTIFY DIMINISHING THE OMAHA RESERVATION

Although the petition presents this Court with a question regarding the effect of the 1882 Act on the Omaha Reservation's boundaries, the real gravamen of petitioners' position (Br. 25) appears to be that "Nebraska residents living in the disputed areas have developed justifiable expectations over the past 130 years." See Br. 2 ("justifiable expectations"); see also Br. 22, 24, 25, 51, 52. Petitioners argue (Br. 52) that those present-day expectations would be "upset" if the Court were to permit the Tribe to enforce its liquor ordinance in the disputed area. Rather than an argument about the Reservation's boundaries, petitioners' real claim is that the "disruptive practical consequences" of recognizing tribal jurisdiction over the disputed area should "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214, 219 (2005).[22]

Although the United States disagrees with petitioners regarding the merits of that argument, the Court should not attempt to resolve it now. The only question raised and decided below, and the only question currently before this Court, is "whether Congress intended to 'diminish' the boundaries of the Omaha Indian Reservation in Nebraska when it enacted [the] 1882 Act." Pet. App. 12-13 (footnote omitted). That question is both analytically distinct

---

[22] Petitioners' amici are even more explicit in calling for application of *City of Sherrill* rather than this Court's diminishment cases. See Village of Hobart et al. Amici Br. 6 (*City of Sherrill* "provid[es] an alternative to congressional diminishment"); Citizens Equal Rights Found. Amicus Br. 3.

from and logically prior to the question whether the Tribe may exercise jurisdiction over non-members within the Reservation's borders once those borders are properly understood. *City of Sherrill*, 544 U.S. at 215 n.9 (recognizing the distinction between a request for equitable relief against a tribe and a claim that the tribe's reservation has been disestablished by Congress). Moreover, application within the Reservation of the liquor law at issue here is expressly authorized by Act of Congress; it does not reflect a unilateral assertion of authority over non-Indians by the Tribe. See pp. 8-9, *supra*.[23]

This Court held more than a century ago that only Congress can diminish a reservation. See *United States* v. *Celestine*, 215 U.S. 278, 284 (1909); see also *City of Sherrill*, 544 U.S. at 215 n.9. Petitioners' plea that the Omaha Reservation has undergone "de facto" diminishment provides no basis for this Court to find diminishment de jure.

---

[23] *City of Sherrill* also differs from the present case along a number of dimensions that would render it inapplicable here. Among other things, the land at issue in that case had been out of tribal control for more than 200 hundred years; the question was whether the tribe could repurchase the land piecemeal, "unif[y] fee and aboriginal title," and thereby "assert sovereign dominion over the parcels" in a tax dispute. 544 U.S. at 213; see *id.* at 202. The question here, by contrast, is solely whether Congress diminished the Omaha Reservation in 1882.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General
WILLIAM B. LAZARUS
MARY GABRIELLE SPRAGUE
KATHERINE J. BARTON
DARON CARREIRO
Attorneys

DECEMBER 2015

APPENDIX

Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 provides:

CHAP. 434.—An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the consent of the Omaha tribe of Indians, expressed in open council, the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying west of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh eighteen hundred and eighty. The said lands shall be appraised, in tracts of forty acres each, by three competent commissioners, one of whom shall be selected by the Omaha tribe of Indians, and the other two shall be appointed by the Secretary of the Interior.

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each bona fide settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs-at law of such settler, who is a citizen of the United States, or who has declared his intention to become such,

shall be entitled to purchase, for cash, through the United States public land-office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case, according to the survey and appraised value of said lands as provided for in section one of this act; *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payment, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made: *And provided further*, That whenever any person shall under the provisions of this act settle upon a tract containing a fractional excess over one hundred and sixty acres, if the excess is less than forty acres, is contiguous, and results from inability in survey to make township and section lines conform to the boundary lines of the reservation, his purchase shall not be rejected on account of such excess, but shall be allowed as in other cases: *And provided further*, That no portion of said land shall be sold at less than the appraised value thereof, and in no case for less than two dollars and fifty cents per acre; *And provided further*, That all land in township twenty-four, range seven east, remaining unallotted on the first day of June, eighteen hundred and eighty-five, shall be appraised and sold as other lands under the provisions of this act.

SEC. 3. That the proceeds of such sale, alter paying all expenses incident to and necessary for carrying

out the provisions of this act, including such clerk hire as the Secretary of the Interior may deem necessary, shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior.

SEC. 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvement, and so forth, proof thereof shall be received by the local land-office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts: *Provided*, That any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

SEC. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be, and he is hereby, authorized, either through the agent of said tribe or such other person as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one sixteenth of a section; which allotments shall be deemed and held to be in lieu of the

allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided: *Provided*, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patients shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the

United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and alloted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That, the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

SEC. 7. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

SEC. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allottments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey, the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the

expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: *And provided further*, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: *Provided*, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

SEC. 9. That the commissioners to be appointed by the Secretary of the Interior under the provisions of this act shall receive compensation for their services at the rate of five dollars for each day actually engaged in the duties herein designated, in addition to the amount paid by them for actual traveling and other necessary expenses.

SEC. 10. That in addition to the purchase, each purchaser of said Omaha Indian lands shall pay two dollars, the same to be retained by the receiver and register of the land office at Neligh, Nebraska, as their fees for services rendered.

Approved, Aug. 7, 1882.

No. 14-1406

In The
Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

DOUGLAS J. PETERSON
Attorney General of Nebraska

JAMES D. SMITH
Solicitor General
of Nebraska
Counsel of Record

RYAN S. POST
DAVID A. LOPEZ
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov

Attorneys for the State of Nebraska

GENE SUMMERLIN
MARNIE A. JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, NE 68508-2967
(402) 434-8040
gene.summerlin@
huschblackwell.com
marnie.jensen@
huschblackwell.com
mark.hill@
huschblackwell.com

Attorneys for Individual & Village Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. DIMINISHMENT SHOWN BY: (1) NO INDIAN CHARACTER, (2) NO TRIBAL OR FEDERAL PRESENCE, AND (3) STATE OF NEBRASKA'S UNINTERRUPTED ASSERTION OF JURISDICTION 2

II. DIMINISHMENT SHOWN BY THE 1882 ACT IN ITS HISTORICAL CONTEXT 15

III. EVENTS SURROUNDING THE 1882 ACT REVEAL A WIDELY HELD CONTEMPORANEOUS UNDERSTANDING THAT THE RESERVATION WOULD SHRINK 19

CONCLUSION 24

APPENDIX

Enlarged Bureau of Indian Affairs Maps of Reservation 1a

TABLE OF AUTHORITIES

Page

CASES

City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) 2, 14

DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425 (1975).....4

Hagen v. Utah, 510 U.S. 399 (1994).....*passim*

Lamplot v. Heineman, 06-cv-3075 (D. Neb. 2006) 10

Mattz v. Arnett, 412 U.S. 481 (1973).....16, 17

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....*passim*

Seymour v. Supt. of Wash. State Pen., 368 U.S. 351 (1962).....16, 17

Solem v. Bartlett, 465 U.S. 463 (1984).....*passim*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998).....2, 4, 18

United States v. Picotte, 8:99-cr-00159-JFB (D. Neb. 1999) 14

Wisconsin v. Stockridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 17

STATUTES

Act of June 10, 1872, ch. 436, 17 Stat. 391.....20, 21

Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 .....*passim*

Act of Aug. 2, 1886, ch. 844, 24 Stat. 214 22

Act of May 15, 1888, ch. 255, 25 Stat. 150.....22

TABLE OF AUTHORITIES – Continued

Page

Act of Aug. 19, 1890, ch. 803, 26 Stat. 329 22

Act of Aug. 11, 1894, ch. 255, 28 Stat. 276.....18, 23

Act of May 6, 1910, ch. 202, 36 Stat. 348 ....13, 16, 18, 23

Indian Reorganization Act, 48 Stat. 984 *et seq.* (1934).....7

Neb. Rev. Stat. § 13-1503 8

INTRODUCTION

If the members of late nineteenth-century Congress could peer into the future and see the fate of the disputed area over the next 130 years, they would be unsurprised to find that the land was populated almost exclusively by non-Indians (over 98%) and that the State of Nebraska had consistently and exclusively exercised criminal and civil jurisdiction over the area. This is true because they would see that their expectation and goal to end the Reservation status of this land had been realized by the early 1900s as almost all the land quickly sold to non-Indian settlers. To the contrary, the members of Congress would no doubt be *very* surprised to learn that the Omaha Tribe and United States government now claimed the land west of the railroad right-of-way still remained part of the Reservation. This reality must inform the Court's diminishment analysis.

This Court should once and for all resolve that the Omaha Reservation was diminished in 1882 and the land at issue in this case is not part of the Reservation. Both this Court's precedent and practical realities demand this result because the disputed area does not have, and has never had, any Indian character, there has never been any federal or tribal presence on the land, and the State of Nebraska has dominated the jurisdictional history of the area, as all governmental services are provided by the State and local agencies.

The 1882 Act, viewed in historical context, indicates that Congress intended to diminish the

Reservation. Indeed, the events surrounding the 1882 Act reveal that everyone – Congress, the Tribe, and the Executive Branch – intended to separate and segregate the western land from the Reservation and relinquish it to the State of Nebraska. The historical and current demographics, land ownership, and assumption of uninterrupted jurisdiction by state and local authorities all confirm this occurred.

This history has "created justifiable expectations," *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-05 (1977), among those who have ordered their lives based on the treatment of the land by authorities at all levels of government. A conclusion that this land should return to the Reservation would greatly disturb these expectations. To the contrary, if the Court determines that the Omaha Reservation was diminished in this case, ***nothing will change*** and the historical status quo will remain undisturbed.

ARGUMENT

I. DIMINISHMENT SHOWN BY: (1) NO INDIAN CHARACTER, (2) NO TRIBAL OR FEDERAL PRESENCE, AND (3) STATE OF NEBRASKA'S UNINTERRUPTED ASSERTION OF JURISDICTION.

As this Court stated in *Solem*, and reiterated in *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), and *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*,

544 U.S. 197 (2005), when an area "has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Solem v. Bartlett*, 465 U.S. 463, 471 (1984). The "subsequent demographic history of opened lands" is an "additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72. Thus, "who actually moved onto opened reservation lands is . . . relevant to deciding whether a surplus land Act diminished a reservation. . . ." *Id.* As this Court emphasized in *Rosebud*:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604-05 (1977).

Nevertheless, Respondents strain to urge the Court to disregard these principles and ignore the jurisdictional history and demographic history of the disputed area. U.S. Br. 28; Omaha Tribal Council ("OTC") Br. 24, 43-44. The Tribe asserts that because "statutes are to be construed liberally in favor of the Indians," "courts cannot . . . [rely] on post-enactment evidence as an indicium of congressional intent." OTC Br. 24. This assertion is wrong and contradicts the

framework set forth by *Solem*. *Solem* explained that "in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue," "[r]esort to subsequent demographic history" for statutory interpretation, "is a ***necessary expedient***." *Solem*, 465 U.S. at 471-72 nn.12 & 13 (emphasis added). In contrast, Respondents advance the proposition – erroneously adopted by the courts below – that analyzing demographic factors amounts to "unnecessary surplus." Pet. App. 7.

Here, the disputed area does not have and *never* has had any Indian character. J.A. 657. Since 1900, as confirmed by the official censuses, over 98% of this land's population has always been non-Indian. J.A. 208, 366. After over a century, the total number of Indians residing in the disputed area is 21 people, which is only 9 more than the initial census data of 12 Indian residents in 1900. J.A. 366. More than 98% of the land in the area was conveyed from the United States to non-Indians. J.A. 204, 350. These statistics are more overwhelming and compelling than the four cases where this Court found diminishment. See *Yankton Sioux*, 522 U.S. at 356-57 (two-thirds of the population was non-Indian and over 90% of the reservation lands were in non-Indian lands); *Hagen*, 510 U.S. at 421 (involved land that was "over 90% non-Indian both in population and in land use"); *Rosebud Sioux*, 430 U.S. at 605 (involved land that was "over 90% non-Indian both in population and in land use"); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 428 (1975) (approximately 90% of the population was

non-Indian and collectively owned approximately 85% of the land); *contra Solem*, 465 U.S. at 480 (finding no diminishment where the overall population of the land was evenly divided between Indians and non-Indians). Contrary to the Tribe's brief, there are no "ever-shifting demographic trends" here. OTC Br. 53. A percentage change in the Indian population from 0.27% to 0.83% over a century is not an "ever-shifting demographic trend." J.A. 366. Rather, it shows the legal conclusion that there is and has been no Indian character in the disputed area since it was opened for settlement.

Regarding jurisdictional authority, the record shows that the Tribe admitted that, "[w]est of the railroad right of way, *all* governmental services are provided by state and local agencies, not by the Omaha Tribe." ECF Doc. 138, 15, ¶ 147, *Smith v. Parker*, 07-cv-3101 (D. Neb. Aug. 29, 2013) (emphasis added). The Tribe admitted by joint stipulation that the Tribe has no office, operates no schools, industries, or businesses in the disputed area and has conducted no governmental or ceremonial activities there. J.A. 216.[1] The Tribe does not offer foster care,

---

[1] The United States incorrectly attempts to invent tribal authority in the area by highlighting that at one time or another a tribal member served as Mayor of Pender, Surveyor of Thurston County, Justice of the Peace, County Attorney, or County Judge. U.S. Br. 45. Contrary to the United States' position, this only shows that a tribal member exercised the authority *of the State of Nebraska* and its municipalities – and the corresponding recognition of the governmental authority of the

(Continued on following page)

medical, welfare, or child protective services in the disputed area. *Id.* The Tribe has no mineral rights or other claims to land in the disputed area. J.A. 227-33; *cf. Solem*, 465 U.S. at 474. Before 2006, and the imposition of the liquor tax scheme which triggered this litigation, the Tribe stipulated that it never enforced tribal ordinances in the disputed area. J.A. 215-16. The complete absence of Indian character or Tribal presence, combined with the State of Nebraska's consistent assertion of jurisdiction, "demonstrates a practical acknowledgment that the Reservation was diminished." *Hagen*, 510 U.S. at 421.

Contrary to what the Omaha Tribe *of today* suggests in its brief, the demographic and jurisdictional history of the disputed area is not a case of "adverse possession or inadvertent loss of sovereign territory." OTC Br. 24. Rather, Congress separated this portion from the Reservation in 1882 *at the Tribe's repeated requests* for over a decade. J.A. 194, 201, 332, 419, 424, 469, 628-30, 636. The Tribe then further expressly consented to the 1882 Act. J.A. 345, 466. The Act of 1882 was the Congressional culmination of the Tribe's requests.

Post-diminishment confirmation "[i]n the years immediately following the opening," *Solem*, 465 U.S. at 471, is shown by official pronouncements in U.S.

State of Nebraska by a member of the Tribe. It does not change the demographics of the number of Indians residing in the disputed area.

government reports and publications clearly and objectively reflecting the diminishment. Reply Br. App. 1a (1883, 1888, and 1892 BIA maps);[2] J.A. 206-07 (1884, 1888, 1898, 1900, 1906, 1909, and 1911 OIA acreage reports); Pet. Br. 34-35.

Here, the land west of the right-of-way was almost entirely sold off to non-Indian settlers by 1919. J.A. 206, 360. All but a few allotments and partial allotments were sold to non-Indians fifteen years before Congress rejected its policy of encouraging surplus land sales and allotments by passing the Indian Reorganization Act, 48 Stat. 984 *et seq.* (1934). Indeed, in 1935, soon after Congress passed the Indian Reorganization Act, the Winnebago Agency issued its Annual Statistical Report stating the total area of the original Reservation was reduced by the sale of 50,157 acres of land west of the railroad right-of-way. J.A. 208, 541.

Non-Indians have consistently, and almost exclusively, resided and worked upon this land continuously since 1882. *Solem*, 465 U.S. at 471. It is their "justifiable expectations," developed over the last 130 years,

---

[2] Petitioners urge the Court to give particular attention to these maps, detailed versions of which Petitioners have included in this reply for the Court's ease of review. It is evident that the Bureau of Indian Affairs – in official maps compiled under the direction of the Commissioner and published in only the first decade following the 1882 Act – drew Pender (reflected as the unlabeled county seat circular marker next to the "P" in "La Porte" in the 1888 and 1892 maps, respectively) *outside* the Reservation's new western boundary, the Sioux City and Nebraska Railroad.

which will be materially disrupted if the Tribe, with the wholesale support of the United States government, is allowed to restore reservation status to the disputed area. The practical result would be that the Tribe would preside over an area owned and virtually entirely populated by non-Indians and over which the Tribe has no governmental, law enforcement, or regulatory presence whatsoever. Simultaneously, State and local authority would be curtailed despite the fact that this area has solely been the concern and responsibility of these governments, not the Tribe or federal government.

After over 130 years of their documented inaction in the disputed area, Respondents cling to the following alleged inconsistencies to support their position that overwhelming evidence of *de facto* diminishment should be ignored. An analysis of each one further shows the weakness of the Respondents' arguments.

1. *Tribal Agreements*. The Tribe correctly notes that Nebraska law permits public agencies to contract with tribal governments to perform government services. OTC Br. 52; Neb. Rev. Stat. § 13-1503. Petitioners agree with the Tribe that cooperation and coordination of services *on the Reservation* should be encouraged. However, the Tribe omits a significant fact. The 130 years of government services provided by the State and local governments in the disputed area were not provided as part of agreements with the Tribe regarding the Reservation. They were provided by the State and local governments to the disputed area just as they would be to any other off-reservation area. The Tribe admitted in the district

court that "[w]est of the railroad right of way, all governmental services are provided by state and local agencies, not by the Omaha Tribe." ECF Doc. 138, 15, ¶ 147, *Smith v. Parker*, 07-cv-3101 (D. Neb. Aug. 29, 2013).

On the few occasions when the State entered into cooperative agreements with the Tribe regarding on-reservation activity, the Tribe tries to expand the terms of these agreements, for purposes of this litigation, beyond the boundaries of the Reservation. OTC Br. 51 (claiming the motor fuel tax agreement "covered lands west of the right-of-way, including Pender"). Even the United States acknowledges that those agreements are not so expansive. U.S. Br. 50-51 ("The agreement applies only to sales 'within the boundaries of [the Omaha] Reservation,' J.A. 1150, although it does not specify those boundaries.").[3]

2. *Revenue Rulings*. Respondents try to rely on Nebraska's rescinded revenue rulings. U.S. Br. 49-50; OTC Br. 51. Not only do these revenue rulings not include any historical or legal jurisdictional analysis of the Reservation's boundaries, or even purport to, but Respondents fail to mention that each revenue

---

[3] The Tribe makes a similar unsupported claim that a cross-deputization agreement between the State and the Tribe included Pender. OTC Br. 51. Similar to the motor fuel tax agreement, the cross-deputization agreement was for "law enforcement on the reservation" and did not specify the Reservation boundaries. J.A. 219-20.

ruling cited was either superseded or rescinded. See Pet. Br. 17, n.2.

3. *Lamplot v. Heineman*. Respondents selectively quote one portion of one brief in *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. 2006), out of context, to claim the State acknowledged Pender lies within the Reservation's boundaries. U.S. Br. 51; OTC Br. 51. But they conveniently fail to mention the procedural context of the *Lamplot* brief. The State, by its filings, was informing the district court in *Lamplot* that the Tribe was an indispensable party in that litigation. The State specifically clarified in *Lamplot* that it was attempting "to illustrate the problems with attempting to resolve [the *Lamplot*] case without the participation of the Omaha Tribe, not to suggest that Pender, Nebraska lies within the Omaha Tribe's reservation." ECF Doc. 31, 2, *Lamplot v. Heineman*, 06-cv-3075 (D. Neb. Oct. 23, 2006). "The State has not argued that Pender, NE is within the Omaha Tribe's reservation boundaries, nor will it do so." *Id.*

4. *United States' 2012 Post-Litigation Flip*. In order to support its position the Reservation was not diminished, the United States relies on a 2008 letter and 2012 memorandum, created in response to a request for litigation assistance from the Tribe. J.A. 1196 (stating "[y]our letter implicitly requests reconsideration of the 1989 opinion issued by this office" as part of the "Omaha Tribe request for Attorney Fees"). Far from serving as confirmation the Reservation has not been diminished, as the United States asserts, U.S. Br. 46, the 2012 retraction of the 1989 opinion

merely shows the post-litigation change of position by the United States.

The few alleged inconsistencies identified by Respondents immediately after diminishment are refuted by the record. See, *e.g.*, U.S. Br. 41-42 (incorrectly claiming cited statements from federal government officials were not in the record and suggesting acreage reports only refer to land occupied by the Tribe); *cf.* J.A. 204-08 (stipulating to officials' statements and stipulating disputed area was not included as part of Reservation acreage reports). The United States selectively quotes subsequent Omaha and Winnebago Agency reports, U.S. Br. 40, while omitting the parts of those reports excluding the disputed area from the boundary description and from the Reservation's total acreage. J.A. 496 (1885 Report stating, "The Omahas have reduced their reservation by selling 50,000 acres, west of the Sioux City and Omaha Railroad . . . "); J.A. 798-99 (1890 Report excluding portion sold and identifying total acreage as 133,840 acres); J.A. 817 (1892 Report excluding portion sold and identifying total acreage of both reservations as 245,200 acres); J.A. 830 (1897 Report excluding portion sold and identifying total acreage as about 133,000 acres); J.A. 1100 (1899 Report identifying total acreage as about 140,000 acres); J.A. 547-49.[4]

---

[4] Apparently recognizing these subsequent agency reports support diminishment, the Tribe instead argues these reports are evidence of the BIA taking action to "dismantl[e] Congressional intent." OTC Br. 49. The only cited basis for the Tribe's assertion

(Continued on following page)

These perceived inconsistencies, some of Respondents' own recent and self-serving creation, do not serve as compelling official acknowledgment of nondiminishment. Nor do they create a record "so rife with contradictions and inconsistencies as to be of no help to either side." *Solem*, 465 U.S. at 478.

Instead, the State of Nebraska "dominated the jurisdictional history," *Solem*, 465 U.S. at 479, of the disputed area. The Tribe admits that west of the railroad right-of-way, ***all*** governmental services are provided by State and local agencies, not by the Tribe. And in *Rosebud Sioux* this Court stated that "the single most salient fact is the unquestioned actual assumption of state jurisdiction over the [area]." *Rosebud Sioux*, 430 U.S. at 603.

The United States' arguments, in an impressive flip-flop, also depart from its position in *Solem*. In *Solem*, the United States argued as follows:

> There is a final caveat. In cases where the opened area of a Reservation was entirely – or almost entirely – sold off to non-Indian settlers before the process was halted by the change of policy enacted in 1934, it may well be right to treat the Reservation as diminished today. This is not merely a bow to current reality. Nor is it an impermissible attempt to construe turn of the century

---

are unsupported statements by the Tribe's hired expert. J.A. 951.

> legislation in accordance with unpredictable future events. On the contrary, we reasonably may suppose that the sponsors of "opening up" legislation would have intended to end the Reservation status of the affected area if and when their expectations were fully realized, but not otherwise. Then, as now, it must have seemed artificial to continue to treat as part of an Indian Reservation a discrete area, typically of large dimensions, once both land ownership and population had ceased to be Indian. Per contra, where no present cession was involved and disappointingly few setters had taken up Congress's invitation, there was, and is, no justification for jurisdictionally separating from the Reservation "core" an adjacent tract that remains significantly Indian in every respect.

Brief for United States as Amicus Curiae 34-37, *Solem v. Bartlett*, No. 82-1253, 1983 U.S. S. Ct. Briefs LEXIS 477.

Exactly so. And as the United States further explained, this Court's precedents fully supported that reasoning.

> All else aside, this explains the result in *Rosebud*. As the Court there stressed, of the more than 2 million acres opened up by the Acts of 1904, 1907 and 1910, only some 4,600 remained unsold in 1938. And, today, more than 90% of the opened area is non-Indian, both in population and land use. In these circumstances, it was obviously difficult to

> conclude that Congress would have wished the affected area to retain Reservation status. At some point, the tail can no longer wag the dog.

Id. The United States now appears to favor the view that the tail can and should wag the dog.

For over a century, State and local governments have relied on the 1882 Act, and the actions and/or inaction taken by the Tribe and United States, in asserting their own civil and criminal jurisdiction in the disputed area.[5] Notably, Respondents' recent effort to assert jurisdiction in the disputed area is not a comprehensive plan to administer a broad array of government services in and around Pender, but rather an isolated attempt to derive revenue from the sale of alcohol at Pender's liquor retailers and bars. In service of that goal, Respondents ask this Court to rewrite history so as to "rekindl[e] embers of sovereignty that long ago grew cold." *City of Sherrill*, 544 U.S. at 215. Their invitation should be declined.

---

[5] The United States does not mention that not only was the federal indictment of tribal member Damon Picotte dismissed, U.S. Br. 52, but the federal judge ordered dismissal *at the request of the federal prosecutor so that he could be "released by the U.S. Marshal to the detainer of the Thurston County Sheriff's Office to be tried on the charge of murder," for a murder committed in Pender. United States v. Picotte*, Docket Entry 17, 8:99-cr-00159-JFB (D. Neb.) (dismissed Oct. 6, 1999) (emphasis added); J.A. 145-52. Picotte remains in a Nebraska prison serving his 30 to 45 year sentence for his state conviction of second degree murder. Pet. Br. 16.

II. DIMINISHMENT SHOWN BY THE 1882 ACT IN ITS HISTORICAL CONTEXT.

This Court has repeatedly emphasized that "explicit language of cession and unconditional compensation are **not prerequisites** for a finding of diminishment." *Solem*, 465 U.S. at 471 (emphasis added); *accord Hagen*, 510 U.S. at 411 ("[W]e have never required any particular form of words before finding diminishment."). In fact, "the notion that [clear language of express termination] is the only method by which congressional action may result in disestablishment [or diminishment] is **quite inconsistent**," *Rosebud Sioux*, 430 U.S. at 588 n.4 (emphasis added), with the "traditional approach to diminishment cases, which **requires** [courts] to **examine all the circumstances surrounding the opening of a reservation**." *Hagen*, 510 U.S. at 411 (emphasis added).

Despite these clear directives, Respondents argue that the absence of words of cession or provisions for payment of a sum certain in the 1882 Act are fatal to Petitioners' position. U.S. Br. 27-28; OTC Br. 17. Just as this Court has rejected that argument in the past, the Court should again reject it.

In *Hagen*, this Court utilized the "traditional approach to diminishment cases, which requires us to examine all the circumstances surrounding the opening of a reservation" to conclude Congress diminished the Uintah Reservation despite the operative statutes not including express language of cession. *Hagen*, 510 U.S. at 411-22. Justice Blackmun recognized this in his dissent in *Hagen*, stating, "[t]he Court relie[d] on

a single, ambiguous phrase [(return to the public domain)] in an Act that never became effective, and which was deleted from the controlling statute, to conclude that Congress must have intended to diminish the Uintah Valley Representative." *Id.* at 422 (Blackmun, J., dissenting).

Similarly, in *Rosebud Sioux*, this Court concluded that at least two acts devoid of cession language diminished portions of the Rosebud Sioux Reservation. *Rosebud Sioux*, 430 U.S. at 612-13, 615 (concluding that like the 1904 Act, the 1907, and 1910 Acts diminished separate and geographically distinct portions of the reservation). Under Respondents' interpretative approach, it is difficult to imagine this Court would have found diminishment intent in *Hagen* and *Rosebud Sioux*.

Contrary to Respondents' claim that the acts in prior cases that did not diminish reservations are virtually identical to the 1882 Act, there are critical differences between the 1882 Act and the surplus land acts at issue in *Solem*, *Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Supt. of Wash. State Pen.*, 368 U.S. 351 (1962). As discussed in greater detail in the opening brief, Congress enacted the surplus land acts in all of these cases after the 1887 Dawes Act, whereas the 1882 Act predated the Dawes Act. Pet. Br. 43-44. This is significant because instead of creating a checkerboard pattern of land ownership, Congress sought to sell to non-Indian settlers land in an area that was "slice[d] off from the reservation."

Wisconsin v. Stockridge-Munsee Cmty., 554 F.3d 657, 663 (7th Cir. 2009).

Relatedly, unlike the 1882 Act, the post-Dawes Act legislation analyzed in *Mattz* and *Seymour* did not open for settlement and sale a specific portion of the tribes' reservations, but instead the entirety of those reservations. *Mattz*, 412 U.S. at 483; *Seymour*, 368 U.S. at 354-55. The issue in *Mattz* and *Seymour* was whether the reservations were entirely *disestablished*, not whether Congress diminished a discrete portion of the reservations. Because the 1882 Act separated a distinct tract of land for settlement by non-Indians, the "checkerboard analysis" of *Mattz* and *Seymour* bears no relevance to the present inquiry.

Several other errors plague Respondents' analysis of the text of the 1882 Act. For example, the Tribe and the United States each emphasize that the 1854 and 1865 treaties with the Omaha Tribe had express cession language, while the 1882 Act did not. U.S. Br. 18; OTC Br. 28-29. This distinction in language is not helpful to understand Congressional intent regarding the reservation boundaries for a surplus land act, rather than a treaty, in which the Congressional concept of land ownership by the Tribe was synonymous with reservation status.

This Court has twice found diminishment when faced with factual scenarios where Congress had previously used hallmark cession language regarding a reservation but did not do so in the surplus land act

at issue. See *Rosebud Sioux*, 430 U.S. at 605-06 (recognizing that the 1904 Act contained cession language, but the 1907 and 1910 Acts did not, and instead of reasoning that the absence of such language in the subsequent acts indicated a change in congressional purpose, concluding that there was "a continuity of intent" through the three acts); *Hagen*, 510 U.S. at 402, 420-22 (recognizing that Congress twice directed the President to appoint a commission to negotiate with Indians for the "relinquishment" and cession to the United States of all unallotted lands, and holding that the 1905 Act without such terms diminished the reservation). *Rosebud Sioux* and *Hagen* show that the distinction in language between the 1882 Act and prior Omaha Indian Treaties is not dispositive nor particularly revealing as to whether Congress intended to diminish the Omaha Reservation in 1882.

Respondents also overemphasize the significance of Congress allowing for Tribe members to select allotments in the disputed area, suggesting that this contradicts a finding of diminishment. U.S. Br. 18; OTC Br. 27. There are many cases in which courts found diminishment even though tribe members were allowed to select allotments on affected land before it was open for settlement and sale. See *Yankton Sioux*, 522 U.S. at 344 (explaining that under the 1894 Act the Tribe would cede all unallotted land); *Hagen*, 510 U.S. at 403-05 (quoting the 1902 Act, which provided an allotment process to tribe members before return of unalloted land to the public domain for sale and

settlement); *Rosebud Sioux*, 430 U.S. at 608 (quoting the statute, which instructed the Secretary of the Interior to sell or dispose of portions of the reservation, except for those that had been, or would be allotted to tribe members).

Regardless, the historical record here is clear that Congress did not expect many, if any, Indians to select land west of the right-of-way. J.A. 198-99, 201-02. The 1882 Act was crafted in such a fashion that once the allotment selections were made, it was closed off to further Indian settlement. J.A. 348-49; C.A. App. 1069-71. This reinforces that in 1882, Congress envisioned that the land west of the right-of-way would remain primarily non-Indian, in contrast to the eastern portion, which would remain a part of the Reservation.

III. EVENTS SURROUNDING THE 1882 ACT REVEAL A WIDELY HELD CONTEMPORANEOUS UNDERSTANDING THAT THE RESERVATION WOULD SHRINK.

Respondents imply that the 1882 Act arose in a historical vacuum. It did not. Events surrounding the 1882 Act's passage, and subsequent understanding of its effects, confirm a widely held understanding the Reservation would shrink.

Respondents urge this Court to impose an impossible standard on Petitioners to show that the events surrounding the 1882 Act reveal a widely held contemporaneous understanding that the Reservation

would shrink because of Congress's action. On one hand, Respondents contend there is an "absence of any discussion of diminishment," U.S. Br. 31, or at most, "snippets" and "scraps" of evidence. OTC Br. 18-19. On the other hand, when Petitioners highlight evidence revealing that the United States and the Tribe understood the 1882 Act would diminish the Reservation, Respondents demand that the Court ignore it, contending that statements referencing "diminishment" are irrelevant, U.S. Br. 36, and that it is improper to consider Congress's understanding of the legal effect of the Act upon the land when analyzing the 1882 Act's purpose. U.S. Br. 33 & n.5. An examination of "all the circumstances" does not mean the Court should ignore evidence that reveals a contemporaneous understanding that the 1882 Act would diminish the Reservation.

The circumstances surrounding the 1872 and 1882 Acts show both Congress and the Tribe intended to diminish the Reservation for over a decade. The western portion of the Reservation, far removed from the Missouri River, had no Indian character and it is unsurprising that in 1871, when the Tribe needed funds, its leaders sought to separate and sell the *uninhabited* western portion of the Reservation. J.A. 194. Acting on the Tribe's request, Congress enacted legislation in 1872 authorizing the Secretary of the Interior, *with the consent of the Tribe*, to separate and sell this land. J.A. 194. While the sale associated with

the 1872 Act was ultimately unsuccessful,[6] the Tribe continued to try to have Congress separate the unused western portion of the Reservation.

In 1882, again at the Tribe's request, the Congressional history shows that Congress agreed to "break[ ] up that portion of the reservation which is to be sold" and "segregate[ ]" the lands occupied by the tribe members. J.A. 647 (statements by Senate member of the Committee that sponsored the Act). Tribal members understood that after this requested separation, the right-of-way would become the new boundary of the reservation. "[T]he white men will occupy up to the railroad on the west. They will build stations and towns; and the Indians will come up to

---

[6] Respondents make much of the fact that Petitioners have never claimed the 1872 Act worked to diminish the Reservation, arguing that if the 1872 Act did not diminish, then surely the 1882 Act did not either. U.S. Br. 21-22; OTC Br. 18. This is easily explained. Quite simply, the 1872 Act did not diminish the Reservation (though Congress intended it to) because the sale of land was unsuccessful. As the United States acknowledged in *Solem*, it is reasonable to "suppose that the sponsors of 'opening up' legislation would have intended to end the Reservation status of the affected area if and when their expectations were fully realized, but not otherwise." Brief for United States as Amicus Curiae 34-37, *Solem v. Bartlett*, No. 82-1253, 1983 U.S. S.Ct. Briefs LEXIS 477. Because Congress's expectations for the 1872 Act were not initially realized, it is reasonable to conclude diminishment did not occur solely as the result of that Act. However, Congress's expectations for the 1872 and 1882 Acts collectively were ultimately fully realized when the entirety of the non-allotted portion of the disputed area was sold pursuant to the 1882 Act.

the railroad from the east and get the benefit of these improvements." J.A. 201, 726. Senator Dawes explained: "The Indians as a tribe consent. This bill goes upon the theory that the Indians as a tribe consent to part with fifty thousand acres of their land." J.A. 466.

Prominent members of Congress also understood that the 1882 Act would reduce the Reservation. J.A. 644 (Senator Saunders: "fifty thousand acres, to be taken from the west part of the reservation"); J.A. 647 (Senator Ingalls: "breaks up that portion," "segregated from the remainder of the reservation," and "jurisdiction of the United States is absolutely relinquished"); J.A. 683 (Senator Dawes: "When this bill came in I was troubled lest the sale of 50,000 acres would leave the reservation too small. . . . I was assured that it would leave an ample reservation . . . "); J.A. 711 (Representative Haskell: "the total amount of land belonging to this reserve . . . after this sale, when the allotments are provided for, 143,000 acres"). As demonstrated by these comments and others highlighted in the opening brief, there was a widely held contemporaneous understanding that the 1882 Act would alter the boundaries of the Reservation.

Because of this legislative history, Respondents attempt to inject the illusion of ambiguity by claiming Congress's own treatment of the affected areas in subsequent legislation demonstrated that it understood that the 1882 Act had not diminished the Reservation. U.S. Br. 38-39; OTC Br. 44-46 (citing Act of Aug. 2, 1886, ch. 844, 24 Stat. 214; Act of May 15, 1888, ch. 255, 25 Stat. 150; Act of Aug. 19, 1890, ch.

803, 26 Stat. 329; Act of Aug. 11, 1894, ch. 255, 28 Stat. 276; Act of May 6, 1910, ch. 202, 36 Stat. 348). The Court should reject this argument because the language utilized by Congress was merely descriptive and reflects that Congress sought to ensure the 1882 Act was a success and accomplished the goal of selling the land west of the railroad right-of-way. *Hagen*, 510 U.S. at 415 (finding the extension of deadlines in later acts were "so that the 'purposes' of the [earlier act] could be carried out"). And it stands to reason that Congress would seek the Tribe's consent before extending the payment terms considering Congress had obtained the Tribe's consent at the outset and given the Tribe's pecuniary interests in the payment scheme. Moreover, the references to the Reservation were "merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905." *Hagen*, 510 U.S. at 420. As in *Hagen* and *Rosebud Sioux*, 430 U.S. at 630 & n.21 (Blackmun, J., dissenting) (explaining there were instances where subsequent legislation referred to the Rosebud Reservation in the present tense), the Court should not allow these passing references to alter its diminishment inquiry.

The bottom line is that from 1872 through 1882, everyone – Congress, the Tribe, and the Executive Branch – intended to separate and segregate the western land from the remainder of the Reservation with the right-of-way as the new western boundary. The historical and current demographics, land ownership, and immediate assumption of uninterrupted jurisdiction by state and local authorities show they

accomplished this objective. This Court's conclusion here must reflect this on-the-ground reality.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted this 13th day of January, 2016.

DOUGLAS J. PETERSON
Attorney General of Nebraska

JAMES D. SMITH
Solicitor General
of Nebraska
Counsel of Record

RYAN S. POST
DAVID A. LOPEZ
Assistant Attorneys General

OFFICE OF THE
ATTORNEY GENERAL
2115 State Capitol Building
Lincoln, NE 68509-8920
(402) 471-2682
James.Smith@nebraska.gov

Attorneys for the
State of Nebraska

GENE SUMMERLIN
MARNIE A. JENSEN
MARK D. HILL
HUSCH BLACKWELL, LLP
610 J Street, Suite 200
Lincoln, NE 68508-2967
(402) 434-8040
gene.summerlin@
huschblackwell.com
marnie.jensen@
huschblackwell.com
mark.hill@
huschblackwell.com

Attorneys for Individual
& Village Petitioners

Enlarged image from 1883 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1298

Enlarged image from 1888 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1299

Enlarged image from 1892 Bureau of Indian Affairs Map of U.S. Indian Reservations, J.A. 1300

No. 14-1406

IN THE

Supreme Court of the United States

NEBRASKA ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

JAMES J. DEVINE, JR.
Counsel of Record
128 Main Street
Oneida, New York 13421
JDevine@centralny.twcbc.com
(315) 363-6600

CURRY & TAYLOR • (202) 393-4141

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

BATES V. CLARK, 95 U.S. 204 (1877) 14
CARCIERI V. SALAZAR, 555 U.S. 379 (2009) 22
CHEROKEE NATION V. GEORGIA, 30 U.S. (5 PETERS) 1 (1831) 11
CITY OF SHERRILL V. ONEIDA INDIAN NATION, 544 U.S. 197 (2005) 3
CONFEDERATE STATES. SEE HOLDEN V. JOY, 112 U.S. 94 (1872) 13, 14
DICK V. U.S., 208 U.S. 340, 352 (1908) 14
DRED SCOTT V. SANDFORD, 60 U.S. 393 (1857) 13
FLETCHER V. PECK, 10 U.S. 87 (1810) 13
JOHNSON V. MCINTOSH, 21 U.S. 543 (1823) 9
POLLARD'S LESSEE V. HAGAN, 44 U.S. 212, 221 (1845) 12
SOLEM V. BARTLETT, 465 U.S. 463 (1984) 3, 7
STATES. SEE AMERICAN INSURANCE CO. V. CANTER, 26 U.S. 511 (1828) 12
U.S. V. CALIFORNIA AND OREGON LAND CO., 148 U.S. 31 (1892) 16
U.S. V. CELESTINE, 215 U.S. 278, 286 (1909) 15
U.S. V. LARA, 541 U.S. 193, 201 (2004) 8
UNITED STATES EX REL KENNEDY V. TYLER, 269 U.S. 13 (1925) 13
UNITED STATES V. DONNELLY, 228 U.S. 243 (1913) 13
WORCESTER V. GEORGIA, 31 U.S. 515 (1832) 11

STATUTES

2 Stat. 289 10
4 Stat. 411 10
4 Stat. 729 ..... 11, 14
10 Stat. 1043 15
18 U.S.C. § 1151 1
22 Stat. 341 ..... 2, 4, 7, 8

22 Stat. 341 ..... 2, 4, 7, 8
22 Stat. 341-343 5
24 Stat. 388 8
25 U.S.C. § 71 8
25 U.S.C. § 451 19
25 U.S.C. § 461 18
25 U.S.C. § 479 19
43 U.S.C. § 1457 20
48 Stat. 984 18

INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERA actually has two board members that live in Thurston County, Nebraska and are directly impacted by the decisions of the lower federal courts that the Village of Pender is again part of the Omaha Indian Reservation. Both board members and their families understand that if Pender is no longer under the primary jurisdiction of the State that they will lose the tax base that allows the village and county to provide the routine services and functions that have made Pender just another local town to shop in and go to for entertainment. In addition, like virtually all of CERA's members they understand what it means to be living in Indian country as defined in 18 U.S.C. § 1151 and do not want tribal jurisdiction to apply to Pender. This is not because they are worried about being governed by people who choose to be members of the tribes occupying the reservation. The problem is not with the people but with the fact that the tribal government is not limited by the application of the Constitution of the United States. Removing an area from state jurisdiction and restoring it to tribal jurisdiction removes all constitutional safeguards to equal protection and due process of law required under state and federal law.

CERF submits this *amicus curiae* brief to add the perspective of its members who have been adversely affected by federal Indian policy and want that policy to significantly change. CERF promotes the belief that the equal protection of the laws should apply to all persons in the United States and to all lands within the exterior boundaries of the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. Since July 8, 1970 when the Nixon Indian Policy was declared, the United States has aggressively promoted tribal sovereignty and deliberately attacked communities to reassert long dead tribal interests disrupting the justifiable expectations of all members of the community. CERF questions what the Nixon Indian policy was supposed to achieve because it has not improved the lives of the Native Americans actually residing on federal Indian reservations and has divided many communities all over our nation.

All of the parties have filed blanket consent letters to the filing of all *amicus curiae* briefs before this Court for this case.[1]

SUMMARY OF THE ARGUMENT

CERF will explain in this brief that the Act of August 7, 1882, 22 Stat. 341, was intended by Congress to diminish the Omaha Indian Reservation. This brief

---

[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

will explain the reasons why there is sufficient language in the legislative history attached to the Act of August 7, 1882 to find that the Omaha reservation on the west side of the railroad right of way was intended to be diminished by Congress. It will then discuss how Congress in the 1880's was trying not to apply the harsh laws of the Indian Policy of 1871 as codified in the Revised Statutes to peaceful and productive Indian tribes like the Omaha. It will then address what this Court's considerations should be regarding diminishment cases in general to try to level the playing field against the United States representing solely the tribal government against all other interests.

This Court needs to discourage the current practice of the United States to continue to disrupt settled communities by reasserting long extinct tribal claims.

ARGUMENT

This Court has acknowledged that restoring tribal interests in mostly non-Indian areas upsets the "justifiable expectations" of the property owners and citizens of that area. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). Unfortunately, the *City of Sherrill* decision has not been applied to an actual diminishment case to update the factors required to prove that an area was intended to be diminished or disestablished by an act of Congress. Specifically, the case of *Solem v. Bartlett*, 465 U.S. 463 (1984) needs to be reexamined and updated to reflect the more recent decisions of this Court.

I. THE ACT OF AUGUST 7, 1882, 22 STAT. 341, WAS INTENDED BY CONGRESS TO DIMINISH THE OMAHA INDIAN RESERVATION

The District Court did not have all of the relevant legislative history or facts surrounding the substitution of S. 1255 in the 1st Session of the 47th Congress that became the Act of August 7, 1882, 22 Stat. 341.[2] A key piece of the legislative history was missing that clearly explains the intent of Congress to not only diminish the Omaha Indian reservation but to restore the lands west of the railroad right of way to the public domain to be sold to *bona fide* purchasers under the public land laws. When S. 1255 was substituted in the House of Representatives by a new bill prepared by Chairman Haskell of the Committee on Indian Affairs a Report to accompany bill S. 1255 was attached to the bill. House of Representatives Report No. 1530, 47th Congress, 1st Session.

House Report No. 1530 is available as part of the now digitized Congressional Record readily available to all federal officials. Cong. Rec. – July 1882: p # Proquest Congressional Publications, web. The digitized Congressional Records are not readily accessible by members of the public. A private company, ProQuest, has digitized the Congressional Record and offers subscription access rights to their database for a fee. The Library of Congress has only digitized about the last 10 years of the Congressional Record. The Library

---

[2] *Amicus Curiae* CERF does not have access to the Joint Appendix filed by the parties. CERF is assuming that because the House Report No. 1530 was not an important part of the briefing in the lower courts that the parties were unaware of its existence.

of Congress has not made their digitized volumes word searchable as has been done by ProQuest.

The Congressional Record was never easy to use. Usually, a Congressional Report attached to a bill was noted in the margins of the Statutes at Large. From that notation in the Statutes at Large it was possible to find the Report in the Congressional Record. Without that notation it would be very difficult and time consuming to try to find any legislative history on a specific bill in the Congressional Record. The House Report No. 1530 is not noted in the margins of the Statutes at Large for S. 1255. *See* 22 Stat. 341-343. That fact would have made it almost impossible for anyone but federal employees with direct access to the searchable ProQuest database to find House Report No. 1530.

The legal consultant for CERF was told of this House Report attached to S. 1255 when she requested an archivist at the National Archives to help her research the legislative history of S.1255 before attempting to write the draft of this *amicus* brief. The archivist printed House Report No. 1530 from the ProQuest database for her. The first two pages of House Report No. 1530 are important part for this case. The remaining pages 3-12 are all personal descriptions by individual Indians that signed the Memorial at the bottom of page 2 "for a grant of land in severalty" explaining their personal reasons for wanting full ownership of the land.

The important part of locating House Report No. 1530 is what it says in the first paragraph was the intent of House Chairman Haskell in introducing the full bill substitute of S. 1255.

> "By the terms of this bill, which is offered as a substitute for Senate bill No. 1255, it is provided that, with the consent of the Omaha tribe of Indians, all that part of the Omaha Indian Reservation in the State of Nebraska, lying west of the line of the Sioux City and Nebraska Railway, may be surveyed, appraised, and sold to actual *bona fide* settlers, who may hereafter, under the provisions of this bill, settle upon said lands, the proceeds of such sale being for the use and benefit of said Omaha tribe of Indians, leaving for the use and occupancy of the Omaha Indians about 140,000 acres of land. There will be sold under the terms of this bill about 45,000 acres of land, to be appraised at not less than $2.50 per acre."

Appendix 1a (emphasis added).

The phrase "leaving for the use and occupancy of the Omaha Indians about 140,000 acres of land" is direct proof that Congress intended in the bill S. 1255 that became the law of August 7, 1882 to diminish the Omaha Indian reservation. If there is still any question as to the Congressional intent for diminishment the next sentence that "There will be sold under the terms of this bill about 45,000 acres of land, to be appraised at not less than $2.50 per acre." resolves any doubt. This second sentence sets a sum certain for the value of the lands to be sold on the western side of the railway. As

the *Solem* Court said when Congressional language of intent to diminish is coupled with a sum certain payment it creates an almost insurmountable presumption that the intent of Congress was to diminish the reservation. *Solem v. Bartlett*, 465 U.S. 463, 471-2 (1984). As the Nebraska parties have stated in their opening brief, the Indian agent reported the consent of the Omaha tribe to the sale of the lands on May 5, 1883. *See* Nebraska Opening Brief at 7, citing J.A. 35.

Why this express language of the intent to diminish the Omaha Indian Reservation is in the House Report attached to S. 1255 and not in the language of the bill is a question that will never be answered. House Report No. 1530 was written to accompany bill S. 1255 as stated on its face. House Report No. 1530 as a matter of statutory construction is the contemporaneous and intended interpretation of Congress of bill S. 1255. As a matter of law, it is a part of the Act of August 7, 1882, 22 Stat. 341. *Solem* at 471. With the inclusion of House Report No. 1530 as part of the legislative history of the Act of August 7, 1882, 22 Stat. 341, the requirements for *de jure* diminishment as described in *Solem v. Bartlett* are met. *Id.* at 471-2.

The Nebraska parties argue how the three requirements set in *Solem v. Bartlett* should have been interpreted by the lower courts to conclude that the Congressional intent of S. 1255 was to diminish the Omaha Indian reservation. "The district court held that ambiguous evidence regarding the first two *Solem* factors-statutory language and legislative history-necessarily foreclosed any possibility that diminishment would be found on a *de facto* basis. Pet. App. 68."

Nebraska Opening Brief at 19. The district court decision was clearly incorrect when the language of House Report No. 1530 is included in the legislative history of the Act of August 7, 1882. But if the district court had followed the instruction of *Solem v. Bartlett* it would have found that the area around Pender had been *de facto* diminished. As the Nebraska parties argue ably in their opening brief there was no question that from 1883 forward the area on the western side of the railway line around Pender was predominantly non-Indian in character and should have been found by the lower courts to have been *de facto* diminished under the rationale in *Solem*. *Id.* at 471-472.

II. THE PURPOSE OF THE DAWES GENERAL ALLOTMENT ACT AND OTHER SURPLUS LAND ACTS BY CONGRESS IN THE 1880'S AND BEYOND WAS NOT FOR THE REASONS DESCRIBED IN *SOLEM V. BARTLETT*

The description in *Solem* of the federal Indian policy surrounding the passage of the Dawes or General Allotment Act of Feb. 8, 1887, 24 Stat. 388, is not what the records of the Congress in the 1880's indicate. What the records of Congress indicate is that the Congress and the federal agencies considered that the changes made to stop making treaties with the Indian tribes and to transfer the primary responsibility over the Indian tribes from the Department of State to the Department of the Interior in 1871 ended the assimilation policy and began a much harsher war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004).

A. The Indian Policy of 1871 rejected and deliberately contradicted the previous Assimilation Indian policy of the early United States

The main policy and purpose of the nascent United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed under the new Constitution. The Northwest Ordinance in Article 3 contained a written federal Indian policy designed to protect and assimilate the Native Americans. It also contained a specific provision prohibiting slavery in Article 6. The Northwest Ordinance contained the basic Indian policy but few details of how to legally acquire land from Native Americans and tribes. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory

and former colonies. This was not a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate the removal of any Indian tribe East of the Mississippi to the Western territories. The same statute conceded that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. *See* Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in 1804, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry for the removal and actual cession of the Indian title in the original States.

In the 1820's the President began to vigorously pursue a removal policy of all Indians east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The removal policy deliberately displaced the remaining Eastern Indians from their ancestral lands to make way for European settlement. Nowhere was this more obvious than the infamous "Trail of Tears." The young nation to progress had to displace the old and complacent sentimental views of Native Americans to their vast areas of land that to European eyes were wild and needed to be put into production. Admittedly, some of these removals were little more than deliberate stealing of the valuable Indian lands for exchanges for undeveloped lands in the Territory of Oklahoma.

This early United States Indian policy was not genocide. This assimilation Indian policy encouraged Indians to be domesticated to the European ways just as immigrants from all countries were being included within the "melting pot" of all people making up the new United States. This Assimilation Indian policy was far from perfect or ideal. Those Indians who wished to retain their tribal customs and ways were removed to federal territories not yet admitted as states. This gave these removed Indians more time and another chance to domesticate themselves to become citizens of what would be new states. This Indian policy lasted into the

1850's when the issues of slavery began to dominate all issues regarding acquisition of additional federal territorial land and the admittance of new states.

Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the new land. Congress has plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). Importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

From the beginning there were skirmishes with the Indian tribes. Under the Assimilation policy of the early days of the nascent United States these skirmishes were viewed as temporary uprisings. The Seneca uprising in New York in 1779 required the

federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913). Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

Starting with the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) that used the Indians to compare and contrast the status of Negroes to justify how they could never become citizens, federal Indian policy began a major shift. *Id.* at 404, 420. The Indian policy of 1871 is a war power policy. *Lara* at 201. The separate racial classification of "Indian" from *Dred Scott* was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Under the 1871 policy

the only good Indian was a dead Indian. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The Indian policy of 1871 rejects the idea that Indians can ever become productive citizens of the United States in complete opposition to the earlier assimilation policy. In the Revised Statutes setting the Indian Policy of 1871 are numerous statutes defining different types of Indian country. These definitions were not designed to protect the Indians from non-Indians trespassing or encroaching on lands reserved to them as the Indian country statute of June 30, 1834 was drafted. 4 Stat. 729, *See also Bates v. Clark*, 95 U.S. 204 (1877). The Indian country sections in the Revised Statutes were done to allow the Indians and Indian tribes to be suppressed by military action on the reservation or if they left the reservations. *See generally Dick v. U.S.*, 208 U.S. 340, 352 (1908).

The point *amicus* is trying to make is that the assimilation policy and the Indian policy of 1871 are two completely separate and contradictory policies. They are not compatible in any conceivable way. Justice Thomas in his concurring opinion in *Lara* called federal Indian policy schizophrenic because the original assimilation policy and the Indian war policy of 1871 are contradictory. *Id.* at 219. Justice Thomas could not have been more right.

B. There is a fundamental misinterpretation of the intent of Congress in adopting the Surplus Land Acts in *Solem v. Bartlett* that seriously misconstrues the intent of Congress in passing the Act of August 7, 1882 for the Omaha Indian tribe

The dockets of the Senate and House Committees on Indian Affairs clearly show the vigorous enforcement of the revised statute laws against the Indian tribes from the end of the Civil War until the early 1880's. By the early 1880's the ardor over the Civil War was finally beginning to subside. Members of Congress were realizing that many Indian tribes had never been hostile to the United States and were being denied the citizenship and land ownership they were promised in the old treaties. No Indian tribe had been considered more cooperative and able to become productive citizens than the Omaha. In fact the Treaty with the Omaha Indian tribe of March 16, 1854, 10 Stat. 1043, was considered the model for many other treaties with cooperative Indian tribes. *See U.S. v. Celestine*, 215 U.S. 278, 286 (1909).

The surplus land act that is at issue in this case was one of the first attempts by Congress to fulfill the old treaty obligations after federal Indian policy shifted to the 1871 policy. Senator Dawes of Massachusetts and Congressman Haskell were the leaders in trying to again assist the non-hostile tribes to make the transition to becoming citizens and true landowners. Congressman Haskell refused to force the Omaha to sell their land as he makes clear in House Report No. 1530 that was attached to S. 1255. His bill substitute

was done in full communication with the Omaha tribe. The majority of Congress was still convinced that the 1871 Indian policy was the right policy for the majority of the Indian tribes. This forced Chairman Haskell to do something that has not been acknowledged in the diminishment or disestablishment case law. This bill, S. 1255, was drafted to be executed under the public land laws and not under the federal Indian law of the 1871 policy.

Chairman Haskell drafted a bill that treated the Omaha tribe more like a business entity than an Indian tribe. Their contractual rights and the obligations of the United States were based on the Treaty of 1854. The Omaha Indians wanted their lands to be divided in severalty so that a subsequent Congress or a corrupt official with the Bureau of Indian Affairs could not remove them from the lands they had broken and were making profitable as had just happened to the Ponca tribe. See House Report at 1a-2a. This bill was designed to pay for the completion of the federal project of dividing their lands into severalty with the sale of the public lands on the western side of the railway line. *See generally U.S. v. California and Oregon Land Co.*, 148 U.S. 31 (1892). This is why the land on the western side of the railway was to be sold to *bona fide* settlers, this provision was supposed to activate the equity jurisprudence of the federal court to consider and balance all of the factors to execute the law as intended by Congress if litigation arose. *Id.* at 38-41.

There are several other provisions in this bill that make it clear it was not to be executed under the 1871 Indian policy. Section 2 of the act authorizes the Secretary of the Interior to issue a proclamation to

open the lands on the western side and set such rules and regulations for their sale as he deems necessary. This proclamation to open the lands had to do two things. First, to execute the law as written by Congress it had to proclaim that the reservation lands on the western side of the railway line were restored to the public domain. Then in the same proclamation the lands could be opened for settlement. This was the only way the sale and authority for the recording of all of these transactions for purchase by *bona fide* settlers could be handled under the General Land Office in Neligh, Nebraska as required by sections 2 and 4 of the Act of August 7, 1882. Section 4 goes on to say that the land patents for these lands shall issue under the homestead and preemption acts. The homestead and preemption acts were the main parts of public land law not Indian law.

Section 5 of the Act then clearly indicates that the division of lands into severalty on the eastern section of the reservation by the Secretary of the Interior will be issued by the Commissioner of Indian Affairs. These lands were clearly intended by Congress to remain part of the Omaha Indian reservation. Sections 6 and 7 attempt to limit the application of the 1871 Indian policy to these lands and people by carving out express rights during the 25 year trust and then stating the express rights the individual Indians will gain after the 25 year trust period expires. Section 7 says "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said

tribe the equal protection of the law." Chairman Haskell was clearly trying to reach back to an assimilation position and give the Omaha tribe what they had been promised under the Treaty of 1854 and to treat these Indians as being fully capable of becoming capable and productive citizens of Nebraska.

The Act of August 7, 1882 was written to stop applying the very harsh Indian policy of 1871 to the Omaha tribe. The same Congressional intent was true five years later for the Dawes General Allotment Act of 1887. In the Congressional Indian Affairs Committee records are notes of hundreds of letters and memorials from churches and organizations all over the country urging the passage of the Dawes Act for non-hostile Indians. These acts of Congress were not intended to destroy Indian tribes but to empower individual Indians. This is also why Congress selected the tribes eligible for general allotment. Indian tribes that were still considered hostile were still under the primary authority of the military as the Indian Policy of 1871 required.

The diminishment and disestablishment cases of this Court all treat the Indian allotments as if they were intended to punish Indian tribes when exactly the opposite is true as to the intent of Congress in passing the acts. This one case cannot confront all of the vilification of the Dawes Act done by the promoters of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., and its deliberate language to stop the Indian allotment process. Nor can it sort out how any good law can become a bad law if it is abused or is corrupted by the federal officials charged with applying it. This Court in this case can address some of

the misassumptions in *Solem v. Bartlett* and correct the application of its principles to the facts and circumstances of the Act of August 7, 1882.

The *Solem* Court cites the Federal Handbook of Indian Law as the source of its understanding of the Surplus Land acts. *Solem* at 466-7, footnote 6. The Cohen Handbook just like the War Powers book of William Whiting were government publications specifically written to convince the Congress, the Courts and the public to agree and follow the new political policy position of the Executive branch for which they were written. The Federal Handbook on Indian Law was begun as the Indian Reorganization Act (IRA) was introduced as a bill in Congress to justify and promote the very extreme recommendations originally proposed by John Collier. As CERF explained in its *amicus curiae* brief for *Carcieri v. Salazar*, the original IRA bill introduced by John Collier used the Indian Policy of 1871 with its definitions of federal power over Indians from *Dred Scott v. Sandford* to find the necessary federal authority for many of its more extreme provisions.

As this Court well knows, when it interpreted 25 U.S.C. § 479 of the IRA as intended by Congress and not as interpreted by the Executive departments it created a major controversy that still has not quieted down. Even the restrained IRA that was eventually passed by the Congress in June of 1934, 25 U.S.C. § 451 et seq., relies on the 1871 Indian policy to permanently stop the allotments and to preserve the territorial status of the reservations indefinitely. As much as the IRA was touted as the New Deal for Indians, it has always had a very dark side because of the real basis of

its constitutional authority.[3] Enforcement of the Surplus Land acts that were written to deliberately avoid the 1871 Indian policy undermine the legal basis and justification of the IRA.

The Act of August 7, 1882 as explained above avoided the race based Indian policy of 1871 by applying the public land law to create the real property ownership rights in the members of the Omaha tribe. No Indians were forced by this Act to do anything. In fact, as House Report No. 1530 proves, the Omaha Indians specifically requested Congress to enact this legislation and gave it their full consent before it was applied to diminish the portion of the reservation west of the railroad right of way.

The three factors of *Solem* should be applied anew to these corrected facts. Congress directly legislated to diminish the Omaha reservation. The language of diminishment in the act itself is somewhat ambiguous but is not ambiguous when the language of the House Report attached to S. 1255 is included. With the House Report the diminishment language is sufficient to support *de jure* diminishment but clearly indicates that *de facto* diminishment occurred. Clarifying that an Indian reservation area that was

---

[3] In fact, CERF has recently confirmed how Richard Nixon took advantage of the IRA and its reliance on the 1871 Indian policy. Nixon and his advisors in 1966 came up with the statute that allows the enforcement of Medicaid against the States. This was adopted under the deal struck between Nixon, Senator Robert Kennedy and President Johnson that ensured the passage of the Medicaid provisions. The statute designed by Nixon, 43 U.S.C. § 1457, is based on 1 Rev. Stat. § 441, the first provision of the codified Indian policy of 1871.

opened by Congress and became almost exclusively non-Indian should have been sufficient for the lower courts to have found *de facto* diminishment would complete an updating of *Solem v. Bartlett*.

III. THIS COURT SHOULD USE THIS CASE TO MAKE ITS OWN FEDERAL INDIAN COMMON LAW POLICY

This Court can either attempt to sort out the contradictory federal Indian policies that Congress has made or it can start making its own common law position that it can use to decide this case and subsequent cases. Continuing to defer to the elected branches to determine federal Indian policy just continues the morass of contradictory federal laws without resolution. This Court needs to admit that Congress is incapable and unwilling to make significant changes that confront the contradictions in the policies and law. This Court also needs to admit that the Executive administration is taking great advantage of the legal morass surrounding federal Indian policy as in this case and has gone overboard in promoting tribal sovereignty to the point of tearing down the very principles this nation was founded upon.

What CERF is proposing is that this Court declare common law principles that it will use to decide Indian law cases from this point forward. For example, this Court can decide from this case that the Omaha Indians were people entitled to become citizens capable of rationally and ably handling their own affairs in 1882. Such a finding by this Court would begin to restore the rights of the Indian people to bring them constitutional protections that they have been denied for far too long.

It would allow this Court to incrementally increase the fundamental constitutional principles that apply to the Indian people.

This is the second time CERF has found legislative history not previously disclosed to the lower courts. This time it is a major omission of a congressional record that would have ended this suit in the federal district court. Admittedly, this is not as bad as the giving of a false legislative history and denying the existence of the lists of tribes eligible for the Indian Reorganization Act that happened in the case of *Carcieri v. Salazar*, 555 U.S. 379 (2009). As long as the federal Department of Justice continues to promote tribal sovereignty against the interests of everyone else these situations will continue. The Department of Justice brings all its substantial resources and expertise against local attorneys who are able lawyers and do their best but do not have equal resources or access to the underlying documents and records to level the playing field.

CERF applauds the rule changes made by this Court to its own rules to prevent misinformation being used in a case again as happened in *Carcieri*. CERF wonders if adding a disclosure rule to the federal rules of civil procedure specifically that a United States agency sued under the Administrative Procedures Act is required to make a full disclosure of all the documents that could have been included in the administrative record would not assist in leveling the playing field and prevent the waste of judicial resources. CERF believes that the digitization of the Congressional Record is generally a major improvement. But that change has created a temporary

problem for accessing these very important records. As more records collections are digitized like those held in the Department of Interior Library, federal access is increased while public access so far has been greatly decreased.

CONCLUSION

This Court should reverse the decisions of the Eighth Circuit Court of Appeals and the federal district court and hold that the Act of August 7, 1882 diminished the Omaha Indian reservation on the western side of the railway line.

Respectfully submitted,
James J. Devine, Jr.
Counsel of Record
128 Main Street
Oneida, New York 13421
(315) 363-6600

No. 14-1406

In The Supreme Court of the United States

NEBRASKA, et al.,

Petitioners,

v.

MITCH PARKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR HISTORICAL AND LEGAL SCHOLARS AS AMICUS CURIAE SUPPORTING RESPONDENTS

BETHANY BERGER
UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW
65 Elizabeth St.
Hartford, CT 06105
bethany.berger@law.uconn.edu

COLETTE ROUTEL
Counsel of Record
MITCHELL | HAMLINE SCHOOL OF LAW
875 Summit Ave.
Saint Paul, MN 55105
(651) 290-6327
colette.routel@mitchellhamline.edu

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. CLEAR EVIDENCE OF CONGRESSIONAL INTENT IS REQUIRED TO DIMINISH RESERVATION BOUNDARIES 4

II. CONGRESS' REPUDIATION OF THE TRAGEDY OF ALLOTMENT UNDERSCORES THAT THE COURT SHOULD NOT AMPLIFY ITS IMPACT ABSENT CLEAR EVIDENCE OF CONGRESSIONAL INTENT 14

A. General Allotment History 15

B. Omaha Experience 22

C. Congressional Repudiation 29

III. RESOLVING CURRENT CONFLICTS ARISING FROM RESERVATION DEMOGRAPHICS MUST BE LEFT TO CONGRESS 30

CONCLUSION 34

APPENDIX

List of Amici Curiae 1a

TABLE OF AUTHORITIES

Page

CASES

Beck v. Flournoy Live-Stock & Real-Estate Co., 65 F. 30 (8th Cir. 1894) 25

Bond v. United States, 134 S.Ct. 2077 (2014) 11

Bryan v. Itasca County, 426 U.S. 373 (1976) 30

Buster v. Wright, 135 F. 947 (8th Cir. 1905) 21, 22

C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U.S. 411 (2001) 9

Cherokee Nation v. Georgia, 30 U.S. 1 (1831) 5

Comptroller of the Treasury of Maryland v. Wynne, 135 S.Ct. 1787 (2015) 32

Cook v. United States, 288 U.S. 102 (1933) 11

DeCoteau v. District County Court, 420 U.S. 425 (1975) 12

Donnelly v. United States, 228 U.S. 243 (1913) 21

Draper v. United States, 164 U.S. 240 (1896) 27

Ex Parte Crow Dog, 109 U.S. 556 (1883) 8

Hodel v. Irving, 481 U.S. 704 (1987) 18

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 8

Mattz v. Arnett, 412 U.S. 481 (1973) 12

Menominee Tribe v. United States, 391 U.S. 404 (1968) 10

Michigan v. Bay Mills Indian Community, 134 S.Ct. 2024 (2014) 5, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 2, 10

Montana v. Blackfeet, 471 U.S. 759 (1985) 9

Morris v. Hitchcock, 194 U.S. 384 (1904) 22

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010) 11

Morton v. Mancari, 417 U.S. 535 (1974) 6

Oklahoma v. Chickasaw Nation, 515 U.S. 450 (1995) 9

Omaha Tribe v. Village of Walthill, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972) 27

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 32

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 12

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 5, 8

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) 30

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) 13, 27

Smith v. Parker, 996 F. Supp. 2d 815 (D. Neb. 2014) 2

Solem v. Bartlett, 465 U.S. 463 (1984) 2, 12, 13, 33

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 12

TABLE OF AUTHORITIES – Continued

Page

Standing Bear v. Crook, 25 F. Cas. 695 (C.C. Neb. 1879) 24

Talton v. Mayes, 163 U.S. 376 (1896) 5

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984) 11

United States v. Bass, 404 U.S. 336 (1971) 11

United States v. Celestine, 215 U.S. 278 (1909) 5

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 6

United States v. Dion, 476 U.S. 734 (1986) 10

United States v. Kagama, 118 U.S. 375 (1886) 6

United States v. Lara, 541 U.S. 193 (2004) 5, 6, 7

United States v. McBratney, 104 U.S. 621 (1881) 4, 27

United States v. Nice, 241 U.S. 591 (1916) 27

United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941) 9

United States v. Sioux Nation, 448 U.S. 371 (1980) 8

United States v. Thomas, 151 U.S. 577 (1894) 21

Worcester v. Georgia, 31 U.S. 515 (1832) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 31

U.S. Const. art. I, § 8, cls. 11-12 5

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. II, § 2, cl. 2 5

U.S. Const. art. IV, § 2, cl. 2 2

U.S. Const. art. IV, § 3, cl. 2 5

TREATIES AND STATUTES

25 U.S.C. §§ 461-63, 464-65 29

34 Stat. 80 (1906) 13

35 Stat. 460 13

Act of March 27, 1854, 10 Stat. 269 21

1865 treaty, 14 Stat. 667 10

Act of June 22, 1874, 18 Stat. 146 10

Act of July 31, 1882, 22 Stat. 179 20

Act of August 7, 1882, ch.434, 22 Stat. 341 ..... *passim*

Act of July 4, 1884, 23 Stat. 79-80 16

Act of March 3, 1885, 23 Stat. 362 21

Act of May 1, 1888, 25 Stat. 113, § 2 16

Act of March 2, 1889, 25 Stat. 94 17

Act of July 1, 1892, 27 Stat. 62 17

Act of Aug. 19, 1894, 28 Stat. 276-77 25

Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349) 19

Act of June 25, 1948, c. 645, 62 Stat. 757, *codified at* 18 U.S.C. § 115 29

TABLE OF AUTHORITIES – Continued

Page

Blackfoot River Land Exchange Act of 2014, Pub. L. No. 113-232 (Dec. 16, 2014) 32

Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47 (2005) 31

Hoopa Valley Reservation Southern Boundary Adjustment Act, Pub. L. No. 105-79 (1997) 31

Indian Reorganization Act. Act of June 18, 1934, 48 Stat. 984 29

Pub. L. No. 103-16 § 12 (1994) 31

Pub. L. No. 113-88 (Jan. 3, 2014) 32

Pub. L. No. 113-119 (June 9, 2014) 32

Pub. L. No. 113-127 (July 16, 2014) 31

Pub. L. No. 113-134 (2014) 31

Pub. L. No. 113-179 (Sept. 24, 2014) 32

Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (1864) 20

Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa, 10 Stat. 1165 (1855) 20

Treaty with the Omaha, 1854, 10 Stat. 1043, art. 1 ..... 2, 9, 27

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

23 U.S. Op. Atty. Gen. 214 (1900) 22

An Indian War Threatened – Settlers are Armed and Organized in Nebraska, Daily Inter Ocean (July 19, 1895) 26

Annual Report of Commissioner of Indian Affairs George Manypenny (Nov. 22, 1856), Sen. Exec. Doc. 34-5, *reprinted in Documents of U.S. Indian Policy* 89 (Francis P. Prucha ed., 3d ed. 2000) 14

Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) 10

Cohen's Handbook of Federal Indian Law § 2.02[1] (2012 ed.) 9

D. S. Otis, *The Dawes Act and the Allotment of Indian Lands* 8 (Francis Paul Prucha ed., 1973) 17, 18, 19

F. Cohen, *Handbook of Federal Indian Law* 208 (1982 ed.) 7, 20, 30, 31

Federal v. State – Government Wins Its Prosecution of Sheriff Mullin, The State (Columbia, S.C.), April 22, 1895 26

Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900* (1976) 18

TABLE OF AUTHORITIES – Continued

Page

Francis Paul Prucha, 1 *The Great Father: The United States Government and the American Indians* 439 (1984) 14, 18, 20

Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (2001) 16, 19

Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) 7

Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 15 (1934) 22

Janet A. McDonnell, *Land Policy on the Omaha Reservation: Competency Commissions and Forced Fee Patents*, 63 NEBRASKA HISTORY 399-411 (1982) 28, 29

Jason M. Tetzloff, *Indian Removal: The Winnebago as Case Study, 1825-1875* (unpublished master's thesis, 1989) 23

Judith A. Boughter, *Betraying the Omaha Nation, 1790-1916* (1998) 25, 26, 27, 28

Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) 19

Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2014) 31

Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) 32

TABLE OF AUTHORITIES – Continued

Page

Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995* (1999) 26, 27

Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) 32

Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984) 7

Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) 10

Robert T. Anderson, Bethany Berger, Sarah Krakoff & Philip P. Frickey, *American Indian Law: Cases and Commentary* (3d ed. 2015) 7, 20

The Institute for Government Research, The Problem of Indian Administration 7 (1928) 18

U.S. Dept. Interior, *American Indian Population and Labor Force* 10 (2014) 34

William T. Hagan, *The Indian Rights Association: The Herbert Welsh Years 1882-1904* (1985) 17

INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are historians, political scientists, and law professors who teach and write about federal Indian policy and American Indian tribes. They file this brief in support of the Respondents.

SUMMARY OF THE ARGUMENT

Petitioners urge this Court to judicially diminish the Omaha Reservation without clear evidence of congressional intent because, they allege, its boundaries negatively impact the non-Indians living within them. To do so would violate fundamental rules of statutory construction, over a century of precedent regarding Indian affairs statutes, and the constitutional role of Congress in governing United States relationships with Indian tribes. It would further extend the devastating impact of allotment, contravening Congress' explicit repudiation of the policy in 1934. If the boundaries of the western part of the

[1] The parties have provided blanket consent to the filing of amicus briefs in this matter. No counsel for any party authored this brief in whole or in part. The amici and their counsel wrote this brief in its entirety. The cost of printing will be paid by the Tribal Supreme Court Project of the Native American Rights Fund ("NARF"). No person or entity other than amici, their counsel and NARF made a monetary contribution intended to fund the preparation or submission of this brief. Amici scholars file this brief as individuals and not on behalf of the institutions with which they are affiliated.

reservation create policy concerns today, Congress is fully capable of adjusting them. Because Congress has not done so, the Court must reject the invitation to do so itself.

In an 1854 Treaty, the Omaha Tribe ceded virtually all of its remaining lands in Nebraska to the United States. Treaty with the Omaha, 1854, 10 Stat. 1043, art. 1 ("1854 Treaty"); Joint Appendix ("J.A.") 886. In return, the United States promised tribal leaders a 300,000-acre reservation as their "permanent home." 1854 Treaty, art. 1, 6, 14; J.A. 886. Petitioners claim that despite this promise, Congress diminished the boundaries of that reservation when it passed an 1882 statute opening a portion of that reservation to sell to settlers. Petitioner's Brief ("Pet. Br.") at i.

Treaties are the supreme law of the land. U.S. Const., art. IV, § 2, cl. 2. While Congress can unilaterally alter the terms of a treaty, there must be "clear evidence" of its intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). The lower federal courts in this case found none, *e.g.*, *Smith v. Parker*, 996 F. Supp. 2d 815, 837 (D. Neb. 2014), and the Petitioners admit to this Court that there is no such "clear evidence" here. Pet. Br. at i (noting that the question presented for review was "[w]hether *ambiguous* evidence concerning the first two *Solem* factors" forecloses a diminishment finding) (emphasis added). Instead, they argue that the western corner of the reservation is diminished because Nebraska has allegedly exercised jurisdiction over the area, and because it is owned and occupied primarily by non-members. *Id.* at 2.

The Court should not adopt the Petitioners' arguments. Doing so would require this Court to ignore more than 100 years of precedent regarding the role of Congress and the courts in Indian affairs and the solemnity of Indian treaties. The Petitioners' approach also jettisons general principles of statutory interpretation, which are, after all, designed to determine congressional intent. Demographic information and the actions of the State – an independent sovereign – in exercising jurisdiction over the area in question, bear little, if any, relation to *Congress'* intent.

The clear intent rule is particularly necessary in the allotment context. Congress believed that allotment would allow Indians to maintain title of the land allotted to them, becoming well-off farmers in communities shared with non-Indians. Instead, within just a few decades, two-thirds of allottees had lost their allotments to non-Indians, often in fraudulent or even blatantly illegal transactions. Although here Congress deliberately opened the area west of the railroad right-of-way to non-Indian settlement, syndicates of real estate speculators abused the law to acquire Omaha allotments throughout the reservation. The State of Nebraska and its subdivisions, moreover, illegally exercised jurisdiction over Indians throughout the reservation, not merely in its western corner.[2] When Congress diminished other reservations

---

[2] State jurisdiction over non-Indians is even less probative as to reservation status, as by 1882 it had already been established that states alone possessed criminal jurisdiction over

(Continued on following page)

in the allotment period, it did so clearly, by requiring complete cessions of all tribal interests or explicitly transferring the land to the public domain in exchange for a lump sum payment for the land ceded. In the absence of any of these indicia of clear intent, demographics and state claims of jurisdiction cannot be used to accomplish what Congress did not.

Congress is well able to adjust reservation borders if they create contemporary problems. Defining the boundaries of tribal territory is a congressional role exercised since the founding. Congress continues to consider and enact multiple bills affecting tribal territories each year. Congress, moreover, is the best institution to consider and balance competing claims and interests regarding the impact of those boundaries. If Petitioners are not happy with the action Congress took in 1882, it is to Congress, not the Court, that they must bring their claims.

ARGUMENT

I. CLEAR EVIDENCE OF CONGRESSIONAL INTENT IS REQUIRED TO DIMINISH RESERVATION BOUNDARIES

Since the founding of the United States, Indian tribes have been recognized as sovereigns, "domestic

---

crimes between non-Indians on reservations. *United States v. McBratney*, 104 U.S. 621, 624 (1881).

dependent nations" possessing "inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014); *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831). Congress, however, has broad authority to govern relations with tribal governments, including by diminishing their sovereign and property rights. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978). The congressional Indian affairs power has frequently been described as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200 (2004), and it has often been exercised in devastating ways. But as in cases in which Congress may invade the traditional authority of other sovereigns, this power has always been tempered by the rule that tribal rights remain unless there is clear evidence of congressional intent to the contrary. Because there is not clear evidence – indeed, no evidence – of congressional intent to diminish the Omaha Reservation in the 1882 Act, diminishment cannot be found.

Congressional power with respect to tribal nations derives from sources similar to the foreign relations power and is similarly broad. As with foreign relations, the Constitution vests Congress with authority over Indian affairs through the commerce, war, and territorial powers, U.S. Const., art. I, § 8, cls. 3 & 11-12; art. IV, § 3, cl. 2, and together with the Executive through the treaty power. U.S. Const., art. II, § 2, cl. 2; *see Lara*, 541 U.S. at 200-04 (finding authority in the commerce and treaty powers); *United States v. Celestine*, 215 U.S. 278, 284 (1909) (locating

authority in the territorial power); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (finding that the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians.") (emphasis omitted). The Court has also suggested that Congress possesses power to regulate relations with tribal governments as one of the "necessary concomitants of nationality," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), part of the "right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." *United States v. Kagama*, 118 U.S. 375, 380 (1886) (upholding the Major Crimes Act despite finding that no specific provision of the Constitution authorized Congress to enact it); *see Lara*, 541 U.S. at 201 (suggesting that, as in *Curtiss-Wright*, Congress' Indian affairs power rests "in part, not upon 'affirmative grants of the Constitution,'" but on pre-constitutional national power); *see also Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (locating power in federal historic obligations to Native peoples as well as treaty and commerce powers).

The authority of Congress to regulate relationships with tribal peoples was clear at the founding and has continued to the present day. For "'the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign

policy than a subject of domestic or municipal law.'" *Lara*, 541 U.S. at 201 (quoting F. Cohen, *Handbook of Federal Indian Law* 208 (1982 ed.)). The founders "drew on the law of nations to determine Native status," framing "nearly all issues of Indian affairs, including the question of land title, through the international law concept of sovereignty." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1059 (2015); *see* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 200 (1984) ("[T]he same powers that sufficed to give the federal government a free rein in the international arena were viewed as sufficient to enable the new government to deal adequately with the Indian tribes."). Although Congress ended treaty-making in 1871, it did so primarily to expand the power of the House of Representatives in Indian affairs. Robert T. Anderson, Bethany Berger, Sarah Krakoff & Philip P. Frickey, *American Indian Law: Cases and Commentary* 89-90 (3d ed. 2015). After 1871, Congress continued to interact with tribes as it would with governments, making war and peace, recognizing and withdrawing recognition from tribal governments, entering into "treaty substitutes" (agreements ratified by statute), and recognizing and adjusting tribal sovereign authority. *Id.* at 90.

This power emphatically belongs to Congress, not the judiciary. *See Lara*, 541 U.S. at 200 (noting that "we have consistently described" Congress' Indian affairs powers "as 'plenary and exclusive'") (citations

omitted). Thus, when the Kiowa, Comanche, and Arapaho Tribes challenged involuntary allotment of their lands, the Court declared that Congress' Indian affairs power "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). While it is now established that the Constitution protects Indian tribes against congressional expropriation of their property, Congress retains broad discretion in Indian affairs. *See United States v. Sioux Nation*, 448 U.S. 371, 408, 409 (1980) (holding that Congress had "paramount power" as "trustee" of Indian land, but was required to provide compensation because it had not made a "good faith effort" to provide full value for taking the Black Hills).

Although Congress has tremendous power to limit the territory and sovereignty of Indian tribes, this power has always been tempered by the requirement that Congress "clearly" and "unequivocally" make its intent to diminish tribal rights known. *E.g.*, *Bay Mills*, 134 S.Ct. at 2032 ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."); *Santa Clara Pueblo*, 436 U.S. at 60 ("[P]roper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (disturbing traditional limits on federal jurisdiction "requires a

clear expression of the intention of congress"); *Cohen's Handbook of Federal Indian Law* § 2.02[1] (2012 ed.) ("[T]ribal property rights are preserved unless Congress's intent to the contrary is clear and unambiguous.").

For this reason, "clear" and "unequivocal[ ]" evidence is necessary to find Congress has abrogated tribal sovereign immunity. *Bay Mills*, 134 S.Ct. at 2031; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001). Similarly, statutes will not be construed to permit state taxation of Indians and tribes in Indian country unless "Congress has made its intention to do so unmistakably clear." *Montana v. Blackfeet*, 471 U.S. 759, 765 (1985); *see also Oklahoma v. Chickasaw Nation*, 515 U.S. 450, 459 (1995) (finding state taxation unlawful "absent clear congressional authorization"). Even with respect to aboriginal property not acknowledged by formal federal action, "plain and unambiguous" or "clear and plain" evidence of congressional intent to abrogate is necessary. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 353 (1941).

This rule applies with particular force in cases such as this one, which involve the abrogation of treaty commitments to an Indian tribe. The Omaha Reservation was established as a result of the 1854 Treaty with the United States, when the Omaha Tribe agreed to "forever relinquish all right and title" to most of their former lands retaining only their current reservation. 10 Stat. 1043; J.A. 191-192. An

1865 Treaty and an 1874 Act explicitly altered the northern border of that reservation,[3] but did not touch its western boundary. Although "Congress may abrogate Indian treaty rights . . . it must clearly express its intent to do so." *Mille Lacs Band*, 526 U.S. at 202. What is "essential" is that there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-40 (1986); *see also Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.").

This rule of construction is familiar from other areas in which Congress has power to adjust the relationship between governments. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 415-17 (1993); *see* Cass R.

---

[3] The language of these cessions stands in stark contrast with the 1882 Act. In the 1865 treaty, the Omaha Tribe agreed to "cede, sell, and convey to the United States" the land, and to "vacate and give possession of the lands ceded by this treaty immediately after its ratification" in exchange for a lump sum of $50,000 plus other considerations. 14 Stat. 667, art. 1-3, 5. In the 1874 agreement, Congress provided a lump sum of $82,000 for the purchase of an additional 12,000 acres for the Winnebago. Act of June 22, 1874, 18 Stat. 146, 170. In the deed of conveyance, the Omaha Tribe agreed to "sell and convey to the United States in trust for the Winnebago tribe of Indians, all the rights, title and interest of the Omaha Indians" in the land. J.A. 934.

Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) (discussing the requirement of a "clear statement before courts will find congressional displacement of the usual allocation of institutional authority"). Like treaties with Indian tribes, treaties with foreign nations "will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)). Similarly, statutes will not be deemed to operate extraterritorially unless "the affirmative intention of the Congress [is] clearly expressed." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). In the same way, there must be clear evidence of congressional intent before a statute will be construed to intrude on state authority. *Bond v. United States*, 134 S.Ct. 2077, 2088-89 (2014). In each of these areas, Congress has power to act, but its action will undermine the traditional boundary lines between governments. In such cases, "'the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Bond*, 134 S.Ct. at 2089 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

For all these reasons, case after case establishes that opening a reservation to non-Indian settlement does not diminish reservation boundaries absent "clear and plain" evidence that Congress intended

diminishment. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Congress [must] clearly evince an intent to change boundaries before diminishment will be found.") (internal quotations omitted); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (same); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975) ("This Court does not lightly conclude that an Indian reservation has been terminated. . . . The congressional intent must be clear, to overcome the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.") (internal citations omitted); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) ("[C]lear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.").

In this case, the 1882 Act and its legislative history provide no evidence whatsoever of congressional intent to diminish the Omaha Reservation. There is no language of cession or restoration to the public domain and no guarantee of a sum certain in payment for the lands. Instead, the Act simply states that the Secretary of the Interior is authorized to cause the land in question "to be surveyed," and if not chosen for a tribal member's allotment, the "unallotted lands are open for settlement" and can be "sold." J.A. 227 (Act of August 7, 1882, ch.434, 22 Stat. 341). The settlement was not even under the general homestead laws, but instead under "such rules and

regulations as [the Secretary] may prescribe." *Id.*; *see also* J.A. 939-940 (recounting ruling by the Secretary of the Interior that lands west of the right of way were not subject to the homestead laws because they were "in the Omaha Reservation"). The Act guarantees no lump sum to the Omahas in exchange for these lands, but rather provides that "the proceeds of such sale, after paying all expenses incident to and necessary for carrying out the provisions of this act . . . shall be placed to the credit of said Indians in the Treasury of the United States." *Id.* at 229. Thus, the language in the 1882 Act is nearly identical to language that this Court has found *not* to result in diminishment in *Solem* and *Seymour v. Superintendent of Washington State Penitentiary*. *Solem*, 465 U.S. at 473 (finding 35 Stat. 460 authorizing Secretary to "'sell and dispose of all that portion of'" the reservations and deposit proceeds for the tribe "suggests the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent"); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962) (finding 34 Stat. 80 (1906), providing that certain lands would be "'open to settlement and entry under the provisions of the homestead laws'" and the proceeds would be "'deposited in the Treasury of the United States to the credit of the'" tribe "did no more than open the way for non-Indian settlers to own land on the reservation").

Only Congress can diminish a reservation's boundaries, and there must be clear evidence of its intent to do so. This rule follows over a century of

precedent requiring clear evidence of congressional intent to diminish tribal sovereign or property rights. In this case, because the 1882 Act provides no evidence of such clear intent, diminishment cannot be found.

II. CONGRESS' REPUDIATION OF THE TRAGEDY OF ALLOTMENT UNDERSCORES THAT THE COURT SHOULD NOT AMPLIFY ITS IMPACT ABSENT CLEAR EVIDENCE OF CONGRESSIONAL INTENT

Congress repeatedly disestablished and diminished reservations during the nineteenth and twentieth centuries, but it did so clearly, through statutes that restored all the land to the public domain or that ceded all interests of the relevant tribes in exchange for lump sum payments. Allotment was a different policy. It was intended to enable Native people to hold on to their allotted lands, become prosperous farmers, and open reservations to white settlers to prevent illegal incursions and enable Indians to learn from the white farmers in their midst.[4]

---

[4] Although Congress hoped that the policy would lead to the end of tribes and reservations, this had been the goal of federal Indian policy for decades. *See* Annual Report of Commissioner of Indian Affairs George Manypenny (Nov. 22, 1856), Sen. Exec. Doc. 34-5, *reprinted in Documents of U.S. Indian Policy* 89 (Francis P. Prucha ed., 3d ed. 2000) (describing reservation policy as "providing for the permanent settlement of the individuals of the tribes . on separate tracts of lands or homesteads, and for the gradual abolition of the tribal character"); Francis

(Continued on following page)

It utterly failed to achieve this intended result. Instead, allottees lost two-thirds of the lands that had been allotted to them, often in fraudulent and illegal actions. On the Omaha Reservation, real estate syndicates fraudulently acquired their lands and state and municipal governments illegally asserted jurisdiction over the Omahas.

In 1934, Congress decisively repudiated allotment and in 1948 codified earlier holdings establishing that Indian country encompassed all lands within reservations. Where Congress clearly intended to diminish a reservation, its intent must be respected. But interpreting white settlement itself to diminish a reservation is a perversion of congressional intent and the judicial role.

A. General Allotment History

Between 1880 and 1934, the majority of Indian lands passed to non-Indians. Prucha, *supra*, 2 *The Great Father* 896 (noting that 138 million acres was

---

Paul Prucha, 1 *The Great Father: The United States Government and the American Indians* 439 (1984) (quoting 1863 report of the Sioux agent that described the policy to "to break up the community system among the Sioux, weaken and destroy the tribal relations, individualize them by giving them separate homes in short, '*make white men of them*' "). Allotment, like the earlier policies, was designed to make Indians voluntarily give up their reservations and tribal status. As discussed below, when Congress was not prepared to wait for voluntary abandonment, it explicitly disestablished or diminished reservations. *See infra* Sec. II.A.

held by Indians in 1887, yet only 52 million acres remained in Indian hands by 1934); Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, 44 (2001) (noting millions of acres of land cessions in the early 1880s). Allotment, however, was not the only, or even primary, cause of land loss during this period. *See* Hoxie, *supra*, at 44 (attributing 60% of land loss during period to major land cessions between 1880 and 1895). Where Congress simply wanted to take lands from Indians in this period, it did so by acquiring the land straight out.

In 1884, for example, Congress declared that the vast Moses-Columbia Reservation in Washington would be "restored to the public domain," implementing an agreement in which the Indians agreed to "relinquish all claim upon the Government for any land situate elsewhere." Act of July 4, 1884, 23 Stat. 79-80 (ratifying Agreement with the Columbia and Colville, July 7, 1883). In 1888, the United States acquired 17.5 million acres from tribes in Montana, providing that the Indians would "cede and relinquish to the United States all their right, title, and interest in and to all the [ceded] lands . . . reserving to themselves only the reservations herein set apart for their separate use and occupation." Act of May 1, 1888, 25 Stat. 113, § 2; *see* Hoxie, *supra*, at 46 (reporting acres acquired). An 1889 statute acquired 9 million acres for the United States, dividing the Great Sioux Nation into seven separate reservations and providing that "all the lands outside of the separate

reservations herein described are hereby restored to the public domain" and that the act was a "release of all title on the part of the Indians." Act of March 2, 1889, 25 Stat. 94, §§ 16, 21. Similarly, in an 1892 statute, 1.5 million acres in the northern half of the Colville Reservation was "vacated and restored to the public domain, notwithstanding any [law] whereby the same was set apart for a reservation." Act of July 1, 1892, 27 Stat. 62. All of these statutes provided the Indians with a sum certain in exchange for the lands. When Congress wanted to diminish a reservation, it did so clearly.

Allotment was a different kind of policy, enacted with different purposes. The policy was urged by those calling themselves the "Friends of the Indian," and forwarded by reformers and progressives in Congress. William T. Hagan, *The Indian Rights Association: The Herbert Welsh Years 1882-1904*, at 12 (1985). In the words of Delos Otis, whose study of allotment was first published in 1934 as part of the legislative history of the Indian Reorganization Act, allotment "was regarded as a panacea which would make restitution to the Indian for all that the white man had done to him in the past." D. S. Otis, *The Dawes Act and the Allotment of Indian Lands* 8 (Francis Paul Prucha ed., 1973).

The policy emerged in part from the government's inability to fill its promises to protect Native people in their land. Policymakers bewailed their powerlessness before illegal incursions by railroads, settlers, and others onto federally-guaranteed reservations.

Prucha, *supra*, 2 *The Great Father* at 669. By providing Indians with full title to individual parcels and opening the rest to non-Indian ownership, allotment's proponents hoped to create both strong legal protections for Indians and a release valve for non-Indian demands. They also fervently believed, in the words of a 1928 government-commissioned study, that "some magic in individual property ownership" would transform Indians into prosperous Americanized citizens. *See The Institute for Government Research, The Problem of Indian Administration* 7 (1928). Upon its enactment, the Indian Rights Association joyously proclaimed that the day would be celebrated along with "Runnymede and Magna Carta, Independence and Emancipation." Quoted in Francis P. Prucha, *American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900*, 255 (1976). They were wrong.

As the Court has acknowledged, "[t]he policy of allotment of Indian lands quickly proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707 (1987). This was often the result of violations of law and policy by local communities, many times in alliance with the agents charged with implementing the policy. White pressure, for example, sometimes led allotting agents to designate the best lands "surplus," rather than allotting it to Indians. Otis, *supra*, at 147. Even where Indians had fertile allotments, they were expected to begin farming without equipment or capital to purchase it. *Id.* at 101-02. Some

only did so by mortgaging their entire crops to merchants – who then claimed the harvest. *Id.* at 146.

The Dawes Act initially provided that allotments would not be subject to sale, encumbrance, or taxation for twenty-five years. In 1906, under pressure to hasten the release of federal control, Congress authorized the Secretary of the Interior to issue a fee patent to any allottee believed "competent and capable of managing his or her affairs." Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The policy was expanded in 1913 to create "competency commissions," charged with "roaming the reservations in search of allottees who could be issued premature patents." Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 11 (1995). In contravention of federal law, the commissions issued patents to Indians who did not want them and who had no hope of keeping their land. In 1917, the Secretary of the Interior expanded the policy further still, to issue early patents to all Indians of less than one-half Indian blood. *Id.* at 12.

Both early patentees and those for whom the trust status expired lost their land in vast numbers. Federal Indian agents reported that "tax collectors, auto dealers, and equipment salesmen descended on the newly patented Indians." Hoxie, *supra*, at 183. "By the end of the allotment era, two-thirds of all the land allotted – approximately 27 million acres – had passed into non-Indian ownership." Royster, *supra*, at 12. Because intestate succession applied to all allotted lands and few Indians wrote wills, much of the

remaining land was divided among tens, sometimes hundreds, of heirs. Anderson, Berger, Krakoff & Frickey, *supra*, at 112-13.

The non-Indians who acquired lands within reservations had ample notice that jurisdictional rules were different there. Although the definition of "Indian country" was contested, Congress began using the term "reservation" to define the scope of federal jurisdiction at the dawn of the allotment period.[5] Just eight days before enacting the Omaha statute at issue here, Congress amended the Indian trader laws to provide that they would apply not only in the Indian country, but "on any Indian reservation." Act of July 31, 1882, 22 Stat. 179. When Congress enacted the

---

[5] The earliest definitions of "Indian country" did not refer to reservation status because they were developed before Congress embarked on the policy of confining Indians on "reservations." *See Cohen's Handbook*, *supra*, §§ 1.03[6][a] & 3.04[2][b]. Beginning in the 1850s, however, the United States entered into dozens of treaties creating reservations for Indian tribes. *See* Prucha, *supra*, 1 *The Great Father* at 334. Many of the reservations either already had non-Indian owned land within their borders, or contemplated sales of such lands. *E.g.*, Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa, 10 Stat. 1165, arts. 2 & 6 (1855) (allowing sale of allotments in fee after five years, and purchase earlier by missionaries and others living with the Indians); Treaty with the Chippewa of Saginaw, Swan Creek, and Black River, 14 Stat. 637 (1864) (creating a six-township reservation that included various already "sold" lands). These treaties anticipated continued federal jurisdiction within reservation borders, *e.g.*, Treaty with the Mississippi, Pillager, and Lake Winnibigoshish Chippewa, 10 Stat. 1165, art. 7 (1855).

Major Crimes Act in 1885, it provided that it would apply "within the limits of any Indian reservation," even those within state boundaries, rather than in Indian country as the criminal sections of the Trade and Intercourse Acts had provided. *Compare* Act of March 3, 1885, 23 Stat. 362, 385 (act applies "within the boundaries of any state" and "within the limits of any Indian reservation") *with* Act of March 27, 1854, 10 Stat. 269, 270 (jurisdiction applies in "Indian country").

The Supreme Court repeatedly upheld such statutes, finding federal jurisdictional rules could apply "independently of any question of title." *United States v. Thomas*, 151 U.S. 577, 585 (1894). In 1912, the Court held that the old restrictive definition of "Indian country" no longer applied in the criminal context, and "nothing can more appropriately be deemed 'Indian country' . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." *See Donnelly v. United States*, 228 U.S. 243, 269 (1913).

Precedent provided notice of the potential for tribal jurisdiction as well. In 1904, the Eighth Circuit – where the Omaha Reservation is located – upheld tribal jurisdiction to tax non-Indians on land they owned in fee. *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). The court rejected arguments that the ambiguity of the definition of "Indian country" for liquor laws controlled the case, stating that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy

in it." *Buster*, 138 F. at 951; *see also Morris v. Hitchcock*, 194 U.S. 384 (1904) (upholding tribal power to tax non-Indians grazing cattle on land leased from individual allottees); 23 U.S. Op. Atty. Gen. 214 (1900) (affirming tribal jurisdiction to regulate non-Indian businesses on fee land on townsites within reservations).

By 1934, Commissioner of Indian Affairs John Collier would testify before Congress, the two-thirds of Indians who had been allotted were "drifting toward complete impoverishment" and about 100,000 Indians had become "totally landless." Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 15, 17 (1934). Allotment had deprived Indians of more than 80% of all land value, and 85% of the land value of allotted Indians. *Id.* at 17. Of the remaining land, half was "desert or semi-desert" and much of the rest was divided among numerous heirs, who could not use it profitably but could only lease it for "diminishing pittances of lease money." *Id.*

B. Omaha Experience

The Omaha experience is a microcosm of the tragedy of allotment. For hundreds of years, the Omaha people have lived in what eventually became the State of Nebraska. J.A. 875-76. Although the Omahas became powerful through trade with the French and Spanish in the eighteenth century, beginning in the 1800s, they were devastated by smallpox

epidemics and repeated attacks from Sioux war parties to the North and Sauk and Fox raiders from the East. J.A. 877-78. Beginning in 1815, the Omahas entered into a series of treaties with the United States, placing themselves under U.S. protection, pledging to protect merchants and travelers across their lands, and ceding their territory east of the Missouri. J.A. 878-83. Although the Omaha Tribe always abided by its treaties, the United States failed to provide the protection it promised. J.A. 880. By the 1840s, the Omahas were cut off from their traditional hunting grounds and Sioux raiders had burned their village to the ground. J.A. 883-84. In desperate need of food and funds, the tribe agreed to cede all but 300,000 acres of their remaining homeland to the United States. J.A. 884-89. With the exceptions of cessions of their northern lands to provide a home for the Winnebago in 1865 and 1874, the boundaries established by the 1854 Treaty remain today.

Although the 1854 Treaty promised the Omahas a "permanent home," by 1882 the Omahas had witnessed the tragic impact of removal on two related tribes, the Winnebago and the Ponca. The Winnebago had been forced to relocate four times in a few decades, from Wisconsin to Iowa to Minnesota to South Dakota, before fleeing to seek shelter on a portion of Omaha land in the 1860s. Jason M. Tetzloff, *Indian Removal: The Winnebago as Case Study, 1825-1875* (unpublished master's thesis, 1989). In the 1870s, a number of Poncas also fled to the Omaha Reservation after over one-quarter of the tribe died after forcible

removal to Indian Territory. A national campaign on behalf of the Poncas led to the famous case *Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), and inspired Eastern ethnologist Alice Fletcher to travel to the Omaha Reservation.

On arriving, Fletcher found a community in great fear of forcible land loss, but divided about what to do about it. Omahas who had taken allotments under the 1865 treaty had been told that their certificates of title were worthless. J.A. 904-05. In 1882, Fletcher helped 50-odd Omahas petition Congress for title to their lands. The petitioners were clear that they represented a minority of the Omahas, the "citizen's party," J.A. 763, the faction "that wishes to become like white people." J.A. 765. But even for this group, the primary goal was to preserve the Omaha people on their reservation.

Kah-a-num-ba, or Two Crows, the first of the petitioners, explained that they had been "wanting titles ever since the Poncas were removed to Indian Territory," because without them, they had "been afraid that we should be taken from our lands, as the Poncas were." J.A. 788. Thomas McCanley concurred: "We were born here. We ought to stay here." *Id.* The others agreed. They wanted titles to their land "that this may be our home always," J.A. 779 (comments of Numba-mo-ni, Charles Webster) and to end the constant fear that "the Indians may be moved away." J.A. 768 (comments of Wah-jze-umba, Alvin Cox).

Although the petitioners had only asked for titles for their own land, the 1882 Act forced allotments on all Omahas. To satisfy Omaha desire for funds to finance improvements and agriculture and settler demands for access to the fertile Omaha reservation, Congress also opened the portion of the reservation west of the railroad right-of-way for non-Indian purchase and settlement. 22 Stat. 341. The Act guaranteed Omahas the right to choose allotments in this area, § 8, and a number of Omahas did so, becoming fixtures in government and business there. J.A. 208-10.

Although the 1882 Act provided that purchasers were supposed to pay for their lands in three yearly installments, Congress extended the time for payment four times between 1886 and 1894. J.A. 987. The 1894 Act specifically provided that the Act was conditioned on the consent of the Omaha Indians. Act of Aug. 19, 1894, 28 Stat. 276-77. This condition responded to requests of the settlers themselves, who acknowledged the continuing rights of the Omahas. J.A. 980. As a result of these delays, the Omahas, who sought to finance their own farming operations, "gained little from the sales of their western lands." Judith A. Boughter, *Betraying the Omaha Nation, 1790-1916*, 110 (1998).

Almost immediately, moreover, non-Indians began illegally leasing the Omahas' allotments in the eastern area, often for "ridiculously low rates." Boughter, *supra*, at 136; *Beck v. Flournoy Live-Stock & Real-Estate Co.*, 65 F. 30 (8th Cir. 1894) (holding

leases illegal). Real estate syndicates – dubbed the "Pender ring" – often paid the allottees a few cents an acre then leased the land to settlers at much higher rates. Boughter, *supra*, at 142-43, 146-47. The Thurston county sheriff even arrested tribal police enforcing federal law regarding the leases, and was then himself arrested with the approval of the United States. *See Federal v. State – Government Wins Its Prosecution of Sheriff Mullin*, The State (Columbia, S.C.), April 22, 1895. Later, William Peebles, a leader in one of the leasing syndicates, purchased 100 rifles to arm a resistance against the federal agent seeking to enforce the lease law. *An Indian War Threatened – Settlers are Armed and Organized in Nebraska*, Daily Inter Ocean (July 19, 1895). The uproar eventually subsided, but a few years later a new federal agent approved leases for huge tracts of land by a new gang of speculators, who quickly subleased to settlers for 50 to 200% profit. Boughter, *supra*, at 163-64.

Although Petitioner relies heavily on its alleged "longstanding exercise of jurisdiction" in the disputed area, Petitioner's Brf. at 32, it fails to mention that for many years it exercised jurisdiction over Indians on the entire reservation, not simply its western portion. Mark R. Scherer, *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995*, 16-17 (1999). This jurisdiction was not based on understandings of the borders of the reservation, but on the mistaken belief that by making allottees "subject to the laws, both civil and criminal, of the State of Nebraska," the 1882 Act removed the Omahas' protection from state

jurisdiction. *Id.* The Supreme Court, however, has made clear that identical language in the Burke Act did not change criminal jurisdiction for allottees. *Seymour*, 368 U.S. at 356 (holding allotment did not subject Indians to state jurisdiction on fee land); *United States v. Nice*, 241 U.S. 591, 600 (1916) (holding that the Burke Act language was "to be taken with some implied limitations, and not literally" and did not remove trust protection from allotted Indians). Nevertheless, Nebraska sporadically exercised jurisdiction in reliance on the Act until the 1970s, even after Nebraska had retroceded jurisdiction under Public Law 280. *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823, 835-36 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972) (rejecting jurisdiction under 1882 Act). State exercises of jurisdiction over non-Indians, of course, are irrelevant, as by 1882 the Supreme Court had already established that states had such jurisdiction within reservations. *Draper v. United States*, 164 U.S. 240, 247 (1896); *McBratney*, 104 U.S. at 624.

Violations of liquor laws added to the devastation allotment caused the Omahas. Prior to allotment, alcohol abuse had largely been stamped out by strict tribal controls. Boughter, *supra*, at 156; 1854 Treaty, art. 12 (noting that "[t]he Omahas are desirous to exclude from their country the use of ardent spirits, and to prevent their people from drinking the same"). But after allotment, liquor sellers surrounded the reservation and bootleggers entered it, often using alcohol to separate the Omahas from their lands.

Boughter, *supra*, at 171. Despite repeated federal campaigns, each time federal pressure lifted, the illegal sales resumed. *Id.*

During the 25-year trust period, non-Indians could not acquire Omaha allotments outright. But in advance of the expiration of the trust period, "speculators descended on the reservation and maneuvered the Indians into fraudulent land transactions." Janet A. McDonnell, *Land Policy on the Omaha Reservation: Competency Commissions and Forced Fee Patents*, 63 NEBRASKA HISTORY 399-411 (1982). A syndicate of Pender businessmen worked together to obtain advance sales of the lands. *Id.* When the federal Indian agent tried to stop them, they had him removed from office. *Id.* Finally, the evidence of fraud was so great that the President extended the trust period for another ten years, until 1919. *Id.*

To assuage angry speculators, however, the Omaha Reservation was the site of the first competency commission issuing early patents. McDonnell, *supra*, at 401-02. The commission was charged with only granting patents to those who knew English and could support themselves. Nevertheless, it issued patents to Omahas who could not write, read, or speak English, and to many who pleaded that they would lose their land if patented. *Id.* at 404-05. One patent, for example, was issued to Mrs. Blackbird, a sixty-five-year-old woman who spoke no English. On receiving the patent, she signed a document with a merchant that she was told would cancel her indebtedness to him. Instead, the document was a deed

transferring her $10,000 property to him for only one dollar. *Id.* at 406. By 1912, 90% of the patentees had lost their land, 8% was mortgaged, and only 2% remained in full Omaha ownership. *Id.* at 407.

C. Congressional Repudiation

By the 1920s, the government's Indian policies were under increasing scrutiny. Far from becoming self-supporting, the impoverished allottees were costing the government more each year. In response, Congress enacted the Indian Reorganization Act. Act of June 18, 1934, 48 Stat. 984. The Act decisively repudiates allotment. In the first section of the Act, Congress declared that "hereafter no land of any Indian reservation . shall be allotted in severalty to any Indian." *Id.* at § 1. The next sections continued the trust status of allotments perpetually, provided for the return to tribal ownership any unsold surplus lands, and authorized exchange and purchase of lands to consolidate the tribal land base. *Id.* at §§ 2-3. These laws remain in effect to this day. 25 U.S.C. §§ 461-63, 464-65.

In 1948, Congress made clear that all land within reservation borders was Indian country under federal jurisdiction "notwithstanding the issuance of any patent." Act of June 25, 1948, c. 645, 62 Stat. 757, *codified at* 18 U.S.C. § 1151. The law followed decades of action by both Congress and the Supreme Court to unify jurisdiction within reservations. *See supra* Sec.

II(A); *Cohen's Handbook*, *supra*, § 3.04[2][c] (discussing cases codified in Act).

As the Court has acknowledged, "courts 'are not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)). Where the nineteenth-century Congress clearly acted to diminish a reservation, as it did repeatedly during the allotment period, that congressional action must be respected. But where Congress failed to do so in the past, it violates the balance of powers between the judiciary and Congress as well as current congressional policy for the Court to adjust boundaries on its own.

III. RESOLVING CURRENT CONFLICTS ARISING FROM RESERVATION DEMOGRAPHICS MUST BE LEFT TO CONGRESS

Lacking evidence of congressional intent, the Petitioners rest their claim largely on the demographics of the disputed area and the alleged expectations of the individuals there. They ignore the expectations of the tribe and its members, who have relied on the treaty promises of the United States and the language of the 1882 Act. The resolution of such modern day policy disputes is committed to congressional

authority and uniquely within the institutional capacity of Congress.

The power to determine where tribal boundaries lie is at the core of Congress' constitutionally defined authority to regulate "Commerce with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Congress has exercised vast authority to define and adjust the borders of tribal territory since the formation of the United States. *See Cohen's Handbook*, *supra*, § 15.05[2] (calling this a "major objective of early governmental policy"). Congress continues to actively consider and resolve issues of tribal territory. Members of Congress have introduced bills related to Indian lands in every congressional session from 1975 to the present. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 120-21, 178-79 (2014). Enacted laws frequently affect reservation boundaries.[6] Congress, moreover, is not bound by inertia in Indian affairs, enacting proposed bills at more than twice the rate at which it enacts bills on average. *Id.* at 87 In the most recent congressional session alone, Congress enacted six Indian land laws, including one to resolve a boundary dispute.[7]

---

[6] *See, e.g.*, Colorado River Indian Reservation Boundary Correction Act, Pub. L. No. 109-47 (2005); Hoopa Valley Reservation Southern Boundary Adjustment Act, Pub. L. No. 105-79 (1997); Pub. L. No. 103-16 § 12 (1994) (establishing and expanding Catawba Reservation).

[7] Pub. L. No. 113-134 (2014) (taking land into trust for the Pascua Yaqui Tribe); Pub. L. No. 113-127 (July 16, 2014) (taking

(Continued on following page)

Adjusting reservation boundaries is also far better suited to legislative than judicial resolution. *See* Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) (arguing that Congress rather than the judiciary has the institutional capacity to adjust tribal sovereignty). The judiciary, limited by evidentiary rules or the submissions of adversarial parties, lacks the capacity to "encompass and take into account the complex repercussions" of tribal boundaries on different groups and communities. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978); *Comptroller of the Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1810 (2015) (Scalia, J., dissenting) (arguing that to "balance the needs of commerce against the needs of state governments . . . is a task for legislators, not judges."). Cases like this, where "the competing considerations . often will be subtle, complex, politically charged, and difficult to assess . . . the adjustment of interests" are uniquely appropriate for congressional resolution. *Cf. Reeves, Inc. v. Stake*, 447

---

lands into trust for the Shingle Springs Band of Miwok Indians); Pub. L. No. 113-119 (June 9, 2014) (taking lands into trust for the Sandia Pueblo); Pub. L. No. 113-88 (Jan. 3, 2014) (authorizing the Fond du Lac Band of Lake Superior Chippewa to sell or exchange non-trust lands); Pub. L. No. 113-179 (Sept. 24, 2014) (ratifying the Secretary of Interior's action to take land into trust for the Gun Lake Tribe); Blackfoot River Land Exchange Act of 2014, Pub. L. No. 113-232 (Dec. 16, 2014) (authorizing exchange of lands along reservation boundary).

U.S. 429, 439 (1980) (declining to hold state action violated interstate commerce clause).

Only Congress, moreover, can draw the fixed reservation boundaries necessary to avoid jurisdictional havoc. A rule like that urged by Petitioners, which permits judicial termination of reservation boundaries on inherently indeterminate and changeable standards like population and exercise of jurisdiction, would lead to an unworkable situation for all governments. If those arrested by a federal, tribal, or state government may resist jurisdiction by asking courts to weigh demographics and sift through contradictory jurisdictional history, it would add tremendous expense and exacerbate the existing law and order crisis facing Native people. While states will have jurisdiction and tribes will generally lack jurisdiction over non-Indians regardless of reservation boundaries, moreover, Omahas and other Indians relying on congressionally-drawn reservation boundaries might suddenly find themselves subject to state jurisdiction because a court finds their community has an insufficiently Indian character. This is yet another reason why "only Congress can divest a reservation of its land and diminish its boundaries" and "no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

Nor are non-Indians in such communities disadvantaged in appealing to Congress. Tribal citizens comprise less than one percent of the entire U.S.

population. *See* U.S. Dept. Interior, *American Indian Population and Labor Force* 10 (2014) (reporting 1,969,167 people were part of an Indian tribe in 2010). The State of Nebraska has already intervened on behalf of Pender. Should the citizens of Pender feel aggrieved at Congress' failure to diminish the Omaha Reservation in 1882, they can count on a fair hearing from Congress today.

CONCLUSION

This Court should uphold the decisions of the Eighth Circuit Court of Appeals and the federal district court and hold that the Act of August 7, 1882 did not diminish the Omaha Indian reservation on the western side of the railway line.

Respectfully submitted,

BETHANY BERGER
UNIVERSITY OF CONNECTICUT
SCHOOL OF LAW
65 Elizabeth St.
Hartford, CT 06105
bethany.berger@law.uconn.edu

COLETTE ROUTEL
Counsel of Record
MITCHELL | HAMLINE SCHOOL OF LAW
875 Summit Ave.
Saint Paul, MN 55105
(651) 290-6327
colette.routel@mitchellhamline.edu

Counsel for Amicus Curiae

Appendix

List of Amici Curiae

Gregory Ablavsky (J.D.) is Assistant Professor of Law at Stanford Law School. His scholarship focuses on the legal history of the early American West, particularly the history of federal Indian law. A lawyer and historian, his publications examining the history of Native sovereignty under federal law include *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) and *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

Bethany Berger (J.D.) is the Thomas F. Gallivan, Jr. Professor of Real Property Law at the University of Connecticut School of Law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds), co-author of two leading casebooks, *American Indian Law: Cases and Commentary* (with Anderson, Frickey & Krakoff), and *Property: Rules, Policies, and Practices* (with Singer, Davidson, and Penalver), and the author of many articles in the fields of American Indian law, legal history, and property law.

Kirsten Matoy Carlson (J.D., Ph.D) is an assistant professor at Wayne State University Law School. A lawyer and political scientist, her research focuses on governmental relations with indigenous peoples in the United States and other countries. Recent articles include *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015), and *Congress, Tribal Recognition, and*

Legislative-Administrative Multiplicity, forthcoming in the *Indiana Law Review*.

Richard B. Collins (J.D.) is a Professor of Law at the University of Colorado, Boulder. He teaches and writes in the areas of constitutional law, Indian law, and property. He is a co-author of *Cohen's Handbook of Federal Indian Law* (1982 ed.).

Seth Davis (J.D.) is an Assistant Professor of Law, University of California, Irvine School of Law, where he teaches and writes in the areas of Federal Indian law, property, federal courts, and administrative law. His articles have appeared in the *Columbia Law Review*, the *Notre Dame Law Review*, the *Wisconsin Law Review*, and the *Columbia Human Rights Law Review*. He is a co-author on the 2015 supplement to *Cohen's Handbook of Federal Indian Law*.

Gregory E. Dowd (Ph.D.) is a Professor of History and American Culture at the University of Michigan. He is the author of numerous books and articles on Native American history, including *War Under Heaven: Pontiac, the Indian Nations, and the British Empire* (2002), and *Spirited Resistance: The North American Indian Struggle for Unity, 1745-1815* (1992).

Joseph Genetin-Pilawa (Ph.D.) is Assistant Professor of History at George Mason University. He is author of *Crooked Paths to Allotment: The Fight Over Federal Indian Policy After the Civil War*, co-editor of *Beyond Two Worlds: Critical Conversations on Language and Power in Native North America*, and

author of many articles on the history of federal Indian policy and American Indian ethnohistory.

Frederick E. Hoxie (J.D., Ph.D.) is the Swanlund Professor of History, Law and American Indian Studies at the University of Illinois, Urbana-Champaign. His scholarship focuses on the history of indigenous peoples in North America. He has written numerous books, book chapters and articles including *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (1984), and "The Reservation Period, 1880-1960," in *The Cambridge History of the Native Peoples of the Americas, North America* (1995).

James McClurken (Ph.D.) is an independent historian and owner of McClurken Research. He is an expert on Native American history in the Midwest, and has written numerous books and articles on the subject. Dr. McClurken has also served as an expert witness in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

Lindsay Robertson (J.D., Ph.D.) is the Chickasaw Nation Endowed Chair in Native American Law at the University of Oklahoma College of Law. He teaches courses in Federal Indian law, legal history, and constitutional law, and has published articles and books in these subjects including a history of *Johnson v. McIntosh* entitled *Conquest by Law* (2005). He is a member of the American Law Institute.

Colette Routel (J.D.) is a Professor at Mitchell Hamline College of Law and Co-Director of the College's Indian Law Program, where she teaches and writes in the areas of Federal Indian Law, Property, and Natural Resources Law.

Judith Royster (J.D.) is a Professor at the University of Tulsa College of Law, where she writes and lectures in the areas of federal Indian law, civil procedure, environmental, and natural resources law. She is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds.), the co-author of *Native American Natural Resources Law: Cases and Materials*, and author of numerous articles in federal Indian law, including *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 11 (1995).

Mark R. Scherer (J.D., Ph.D.) is the Martin Professor of Western American History at the University of Nebraska-Omaha. He is the author of numerous books and articles on Native American history including *Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945-1995* (1999).

Joseph William Singer (J.D.) is Bussey Professor of Law at Harvard Law School, where his scholarship focuses on property law and federal Indian law. He is an executive editor and co-author of *Cohen's Handbook of Federal Indian Law* (2005 & 2012 eds). He is the founding author of a leading casebook, *Property: Rules, Policies, and Practices*, and many books and articles on property and American Indian law.

Heidi Kiiwetinepinesiik Stark (Ph.D.) is an Assistant Professor of Political Science at the University of Victoria. Her scholarship focuses on treaty relationships with Indian tribes in the United States and Canada. She is the co-author of *American Indian Politics and the American Political System* (3d ed., 2010), and *Centering Anishinaabeg Studies: Understanding the World Through Stories* (2013). Her forthcoming book is entitled *Anishinaabe Treaty-Relations and U.S./Canada State-Formation* (2016).

Michalyn Steele (J.D.) is an Associate Professor of Law at the J. Reuben Clark Law School at Brigham Young University. She teaches courses in Federal Indian law, civil rights, and constitutional law. Her research focuses on separation of powers principles and tribal sovereignty. Her most recent article, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, is forthcoming in the UCLA Law Review (2016).

David Wilkins (Ph.D.) holds the McKnight Presidential Professorship in American Indian Studies at the University of Minnesota. He has published numerous books including *American Indian Politics and the American Political System* (3d ed., 2010), *Documents of Native American Political Development: 1500s-1933* (2009), *Uneven Ground: American Indian Sovereignty and Federal Law* (2002), and *Tribes, Treaties, and Constitutional Tribulations* (1999).

No. 14-1406

In The Supreme Court of the United States

STATE OF NEBRASKA, *et al.*,

Petitioners,

v.

MITCH PARKER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MARC D. SLONIM
Counsel of Record
RICHARD M. BERLEY
ZIONTZ CHESTNUT
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

DONALD R. WHARTON
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
wharton@narf.org

JOHN DOSSETT
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street NW
Washington, DC 20005
(202) 466-7767
John_Dossett@NCAI.org
Counsel for the National Congress of American Indians

Counsel for Amici Curiae

[Additional *Amici Curiae* Are Listed On The Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

ADDITIONAL *AMICI CURIAE*

Affiliated Tribes of Northwest Indians; Bois Forte Band of Chippewa; Eastern Shoshone Tribe; Ewiiaapaayp Band of Kumeyaay Indians; Elk Valley Rancheria, California; Fond du Lac Band of Lake Superior Chippewa; Great Lakes Indian Fish & Wildlife Commission, Odanah, Wisconsin; Grand Portage Band of Lake Superior Chippewa; Hoopa Valley Tribe; Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Hayward, Wisconsin; Leech Lake Band of Ojibwe; Lower Sioux Indian Community in the State of Minnesota; Mille Lacs Band of Ojibwe; Northern Arapaho Tribe; Minnesota Chippewa Tribe; Oneida Tribe of Indians of Wisconsin; Prairie Island Indian Community; Quapaw Tribe of Oklahoma (the O-Gah-Pah); Red Lake Band of Chippewa Indians; The Sokaogon Chippewa Community, the Mole Lake Band of Lake Superior Chippewa; Swinomish Indian Tribal Community; White Earth Band of Chippewa Indians.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	9
I. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Would Upset Settled Expectations and Promote Unnecessary Litigation	9
II. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Is Unnecessary	18
A. The *Solem* Test Already Permits Consideration of Post-Enactment Events	19
B. Petitioners and Their *Amici*'s Concerns Regarding the Inclusion of Non-Indian Communities within Indian Reservations Are Overstated and Misleading	20
III. Petitioners' and Their *Amici*'s Attempts to Distort or Replace This Court's Long Established Approach to Determining the Effect of a Surplus Lands Act Would Improperly Displace Congress's Constitutional Role in Indian Affairs	31

TABLE OF CONTENTS – Continued

Page

A. Petitioners' Attempt to Change the Weight Given to the *Solem* Factors Is Inconsistent with Sound Principles of Statutory Construction 32

B. The Court Should Not Abandon the *Solem* Test in Favor of a Test Based on *City of Sherrill* that Ignores Congressional Intent 35

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) 10

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 24

Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967) 15

Cass Cty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998) 6, 40

Chapman v. United States, 500 U.S. 453 (1991) 33

City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972) 15

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) ..... *passim*

City of Timber Lake v. Cheyenne River Sioux, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) 6, 7

Colorado River Indian Tribes v. Parker, 705 F. Supp. 473 (D. Ariz. 1989) 14

Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982) 14

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996) 13

TABLE OF AUTHORITIES – Continued

Page

Cty. of Mille Lacs v. Benjamin, 262 F. Supp. 2d 990 (D. Minn. 2003), *aff'd*, 361 F.3d 460 (8th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004).....21

DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Cir., 420 U.S. 425 (1975).....9, 20

Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994).....13

Ellis v. Page, 351 F.2d 250 (10th Cir. 1965).....15

Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002).....25

Hagen v. Utah, 510 U.S. 399 (1994), *reh'g denied*, 511 U.S. 1047 (1994).....*passim*

Kills Plenty v. United States, 133 F.2d 292 (8th Cir. 1943).....39

King v. Burwell, 135 S. Ct. 2480 (2015).....34

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971).....15

Leech Lake Band v. Cass Cty., 108 F.3d 820 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, 524 U.S. 103 (1998).....13

Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983).....14

Mattz v. Arnett, 412 U.S. 481 (1973).....9

Melby v. Grand Portage Band of Chippewa, U.S. Dist. LEXIS 24061; 1998 WL 1769706 (D. Minn. 1998).....13

TABLE OF AUTHORITIES – Continued

Page

Montana v. United States, 450 U.S. 544 (1981) 5

Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012).....22

Nevada v. Hicks, 533 U.S. 353 (2001).....16, 30

New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).....23

Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).....30

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).....5, 23

Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis., 542 F. Supp. 2d 908 (E.D. Wis. 2008).....17, 25

Oneida Tribe of Indians of Wisconsin v. Village of Hobart,Wis., 732 F.3d 837 (7th Cir. 2013).....17, 30

Osage Nation v. Irby, 597 F.3d 1117 (10th Cir. 2010).....12, 38

Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995).....6

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) 14

Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).....24

Rice v. Rehner, 463 U.S. 713 (1983).....6, 7

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).....9, 11, 20, 33, 37

TABLE OF AUTHORITIES – Continued

Page

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 10

Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962) 4, 9, 11, 20

Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005) 13

Solem v. Bartlett, 465 U.S. 463 (1984) ..... *passim*

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) ..... *passim*

State v. Clark, 282 N.W.2d 902 (Minn. 1979) 15

State v. Davids, 194 Wis.2d 386, 534 N.W.2d 70 (1995) 15

State v. Johnson, 212 Wis. 301, 249 N.W. 284 (1933) 39

State v. Romero, 142 P.3d 887, 140 N.M. 299 (2006) 15

United States v. Celestine, 215 U.S. 278 (1909) 2, 3, 10

United States v. Frank Black Spotted Horse, 282 F. 349 (D.S.D. 1922) 39

United States v. Grey Bear, 828 F.2d 1286 (8th Cir.), *reh'g denied*, 836 F.2d 1086, *reh'g granted, vacated in part*, 836 F.2d 1088 (1987) 14

United States v. Lara, 541 U.S. 193 (2004) 8, 10

United States v. Mazurie, 419 U.S. 544 (1975) 6, 10

TABLE OF AUTHORITIES – Continued

Page

United States v. McBratney, 104 U.S. 621 (1882) 23

United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) 14

United States v. Philadelphia Nat. Bank, 374 U.S. 321 (1963) 33

United States v. Standish, 3 F.3d 1207 (8th Cir. 1993) 13

United States v. Webb, 219 F.3d 1127 (9th Cir. 2000) 13

White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982) 14

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 22

Wisconsin v. Stockbridge-Munsee Cmty., 554 F.3d 657 (7th Cir. 2009) 12

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) 13

STATUTES

18 U.S.C. § 1151 ..... 8, 18, 38, 39

18 U.S.C. § 1154 ..... 6, 18, 40

18 U.S.C. § 1154(c) 8, 18, 39

18 U.S.C. § 1156 ..... 6, 8, 18, 39, 40

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1161 ..... 6, 7, 8, 40
18 U.S.C. § 1162 23
25 U.S.C. § 177 36
26 U.S.C. § 168(j) 27
28 U.S.C. § 1360 22
23 Stat. 362 39
Ariz. Rev. Stat. § 11-952 31
Minn. Stat. § 471.59(1) 31
Mont. Code Ann. § 18-11-101 31
Neb. Rev. Stat. § 13-1501 30
Okla. Stat. tit. 74 § 1221 31
Res. 37, 80th Leg., 1st Sess. (Ne. 1969) 23
SDCL 10-12A 31
Wyo. Stat. § 16-1-101 31

FEDERAL REGULATIONS

Dept. of Interior, Notice of Acceptance of Retrocession Jurisdiction, 35 Fed. Reg. 16,598 (Oct. 24, 1970) 24

OTHER AUTHORITIES

Agreement for the Collection and Dissemination of Motor Fuel Taxes (2005), http://revenue.nebraska.gov/fuels/legal/Agreement%20with%20Omaha%20Tribe%20Sept%202005.pdf 28

TABLE OF AUTHORITIES – Continued

Page

Child Welfare, Adult and Child Protection and Safety Services, and Juvenile Services Contract (2011), http://dhhs.ne.gov/children_family_services/Contracts/47253O4OmahaAPSCPS.pdf.....28

Cooperation Agreement [*with the City of Green Bay*] (1984), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CITYofGreenBayOHACooperationAgreement.43184.pdf.....28

Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska (2001), https://www.walkingoncommongrourd.org/state.cfm?topic=12&state=NE.....31

Exchange of Services Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyExchangeofServicesAgreement.pdf.....29

Indian Child Welfare, Adult and Child Protections and Safety Services, and Juvenile Service Agreement (2010), http://dhhs.ne.gov/children_family_services/Contracts/3696904Omaha2010.pdf.....28

TABLE OF AUTHORITIES – Continued

Page

Intergovernmental Service Agreement Between Oneida Tribe of Indians of Wisconsin and Outagamie County Drainage Board (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/OutagamieCountyDrainageBoardIntergovernmentalService.pdf 29

Interlocal Agreement for the Formulation of the Northeast Nebraska Enterprise Zone Association under the Nebraska Enterprise Zone Act (1994), http://omaha-nsn.gov/wp-content/uploads/2013/06/Appendix-I-Northeast-Nebraska-Enterprise-Zone-Association.pdf 28

National Congress of American Indians, Policy Research Center, *Population and Land Area of Cities/Towns within Reservations or Oklahoma Tribal Statistical Areas* (2015), http://www.ncai.org/resources/ncai_publications/analysis-of-cities-and-towns-inside-reservations 21

Mark Fogarty, "The Growing Economic Might of Indian Country," Indian Country Today, (March 15, 2013), http://indiancountrytodaymedianetwork.com/2013/03/15/growing-economic-might-indian-country-148196.....27

Service Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County (2008), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyServiceAgreementandAmendments.pdf.....29

TABLE OF AUTHORITIES – Continued

Page

Service Agreement Between Oneida Tribe of Indians of Wisconsin and City of Green Bay (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CityofGreenBayServiceAgreement.pdf 28

Service Agreement Between Oneida Tribe of Indians of Wisconsin and Town of Oneida (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/TownofOneidaServiceAgreement.07.27.2012.pdf 29

Service Agreement Between Oneida Tribe of Indians of Wisconsin and Village of Ashwaubenon (2013), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/Service%20Agreement%20with%20Ashwaubenon%202014.pdf 29

Wisconsin State Tribal Relations Initiative, *Oneida Nation of Wisconsin Tribal Profile* (2010), http://witribes.wi.gov/docview.asp?docid=5637&locid=57 27

SECONDARY AUTHORITIES

Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 HARV. L. REV. 922 (1999) 16

INTEREST OF *AMICI CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages. Since 1944, NCAI has advised tribal, state and federal governments on a range of Indian issues, including the relevance and legal interpretation of treaties, statutes and executive orders (a) setting aside or establishing reservations as permanent homelands for Indian tribes and (b) providing for the allotment or sale of lands within such reservations. The additional *amici* listed on the inside cover of this brief comprise two tribal organizations and 20 individual tribes, all of whom have direct interests in the interpretation of treaties, statutes and executive orders relating to the boundaries of Indian reservations.

SUMMARY OF ARGUMENT

This Court should reject petitioners' and their *amici*'s invitation to distort or change the "fairly clean analytical structure" summarized in *Solem v. Bartlett*, 465 U.S. 463 (1984), to determine whether

[1] The Parties filed blanket consents to the filing of *amicus* briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief.

Congress, in enacting a surplus lands act, intended to diminish an Indian reservation. The Court's long-standing approach recognizes that "[o]nly Congress can divest a reservation of its land and diminish its boundaries," and that, once a block of land is set aside for an Indian reservation, "no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)).[2] To determine whether Congress intended to diminish a reservation in a particular surplus lands act, the Court consistently has employed a three-part inquiry, looking first to the language of the statute, then to the surrounding circumstances and lastly (and to a lesser extent) to subsequent events. *Id.* at 470-72 & n.13.

Petitioners would distort the *Solem* test by giving greater weight to the third factor – post-statutory events – which this Court has long held should be given the least weight in interpreting Congress's intent (and which is the least consistent with normal principles of statutory construction). *Amici* Village of

---

[2] The *Celestine* Court traced this authority to the Property Clause: "By the second clause of § 3, Art. IV, of the Constitution, to Congress, and to it alone, is given 'power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' From an early time in the history of the government, it has exercised this power, and has also been legislating concerning Indians occupying such territory." *Id.* at 284.

Hobart and Pender Public Schools go much further, arguing that tribes and the United States should be precluded from asserting any jurisdiction within reservations or portions of reservations that (allegedly) lacked sufficient indicia of Indian character over a long period of time – regardless of whether Congress ever intended to diminish the reservation's boundaries. They invoke *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), in support of this approach, a case that involved the displacement of an Indian tribe from its ancestral lands in the earliest years of the republic, and that has never been applied to override Congress's intent to preserve (or diminish) a reservation in a late-nineteenth or early-twentieth century surplus lands act.

Both of these arguments should be rejected. As respondents note, no question regarding the continued applicability of the *Solem* test was presented below or in the questions presented to this Court. Moreover, these arguments would distort or repudiate an unbroken line of this Court's precedents in reservation boundary cases, upsetting settled expectations and promoting unnecessary litigation. As the Court recognized in *Solem*, 465 U.S. at 470, the rule that only Congress can alter a reservation's boundaries (and that the issuance of fee patents to reservation lands does not by itself diminish a reservation's boundaries) has its roots in this Court's decisions extending back as far as *Celestine* in 1909. The Court's modern, three-step analysis to ascertain Congress's intent in a particular surplus lands act has been

employed in seven decisions, beginning 53 years ago in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). This same approach has been applied in more than 20 lower federal court cases involving 17 different reservations, including criminal cases in which jurisdiction depended on whether or not the crime occurred within an Indian reservation. As a result, a significant change in this Court's test could reopen long-settled disputes over reservation boundaries throughout the country; call into question criminal convictions; upset cooperative agreements among federal, state and tribal governments premised on existing boundary determinations; and promote renewed litigation – either by parties to earlier litigation, claiming that a change in the law entitles them to revisit the issue of reservation status, or by non-parties to prior litigation, who would not be bound by earlier rulings under a different test, even as a matter of *stare decisis*.

No change in this Court's test is necessary. Petitioners and their *amici* urge this Court to distort or alter its existing test in order to protect what they allege to be the settled expectations of non-Indian communities. However, changing the Court's settled approach to surplus lands cases, which is rooted in over 100 years of precedent, is hardly the way to protect settled expectations. And, because the current test already permits consideration of events occurring after passage of a surplus lands act, including settlement patterns, where they are of assistance in

ascertaining Congress's intent, the proposed changes are unnecessary.

A finding that a non-Indian community is within the boundaries of a reservation will not have the dire consequences that petitioners and their *amici* fear. According to United States census data, 138 cities, towns and villages overlap or are included within reservation boundaries in 21 states (excluding non-reservation tribal areas in Oklahoma), and very few have expressed the types of the-sky-is-falling concerns articulated by petitioners and their *amici* (who comprise only a single village in Wisconsin, a school district in Pender, and two non-governmental organizations). This is due, in part, to positive interactions between Indians and non-Indians on many reservations, the fiscal benefits tribes bring to non-Indian communities within their reservations, and intergovernmental agreements through which Indian and non-Indian governments provide enhanced services and benefits within reservations. Moreover, as a general matter, state and local governments have jurisdiction over non-Indians within Indian reservations, while tribes have limited authority over non-Indians, especially on non-Indian fee lands. Except as expressly authorized by Congress, tribes have no criminal jurisdiction over non-Indians under *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and generally lack civil jurisdiction over non-Indians on fee lands as well, subject to the two exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981). And, the Court has rejected tribal claims of tax immunity, such

as those asserted in *City of Sherrill*, on reservation lands that became freely alienable under late-nineteenth and early-twentieth century allotment and surplus lands acts, such as the 1882 Act at issue here. *See, e.g., Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

In this case, the Omaha Tribe's liquor ordinance, which, according to petitioners, is the *only* assertion by the Tribe of jurisdiction over non-Indians in the disputed area *ever*, was premised on an express delegation of authority from Congress as interpreted by the Eighth Circuit. *See* 18 U.S.C. § 1161; *City of Timber Lake v. Cheyenne River Sioux*, 10 F.3d 554 (8th Cir. 1993) (Congress's delegation of liquor regulatory authority to tribes in § 1161 extends to non-Indian communities in Indian country), *cert. denied*, 512 U.S. 1236 (1994). This Court has long recognized the unique history surrounding the regulation of liquor in Indian country and Congress's role in allocating federal, state and tribal regulatory authority in this area. *See Rice v. Rehner*, 463 U.S. 713 (1983); *United States v. Mazurie*, 419 U.S. 544 (1975); *see also* 18 U.S.C. §§ 1154, 1156, and 1161. Although the question whether Congress's delegation of regulatory authority to tribes in § 1161 extends to non-Indian communities has not been resolved definitively by this Court,[3] petitioners chose not to argue in this case

---

[3] *See Mazurie*, 419 U.S. at 553 (dicta suggesting that a liquor establishment "located in a non-Indian community" would be "excepted from tribal regulation"); *see also Pittsburg &*

(Continued on following page)

that the Omaha Tribe's liquor ordinance exceeded the scope of such authority.[4] If tribal authority to regulate liquor sales in non-Indian communities in Indian country is problematic, the solution lies either with Congress or with a proper challenge to the scope of § 1161, not with the revision of this Court's well-established reservation-boundary jurisprudence.

Finally, the changes requested by petitioners and their *amici* to this Court's longstanding test for determining the effect of a surplus lands act are improper because they would displace Congress's paramount constitutional authority over Indian affairs. While allowing for consideration of post-statutory events, this Court's test is focused on ascertaining Congress's intent in enacting a surplus lands act. Replacing the current test with one based solely or primarily on an

---

Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1544 n.13 (10th Cir. 1995) (same); *but see City of Timber Lake*, 10 F.3d at 557-58 ("[b]y specifically referring to the broad definition of Indian country in § 1151 , the Court in *Rice* made clear that the geographic scope of state and tribal authority extends to a reservation's four corners") (citing *Rice v. Rehner*, 463 U.S. at 715 & n.1).

[4] Petitioners' tactical choice prevents this Court from considering the scope of Congress's statutory delegation of authority to tribes to regulate liquor sales in Indian country in this case, notwithstanding that the tribal liquor ordinance that triggered and remains at the heart of this litigation was expressly adopted by the tribe and approved by the Secretary of the Interior under that statute. The Court's inability to consider the scope of § 1161 is another reason why the Court might wish to consider whether the writ was improvidently granted. *See* Brief for Respondents Omaha Tribal Council at 48 n.6.

assessment of the Indian or non-Indian character of an area after the passage of a surplus lands act would effectively displace Congress's authority to define Indian country and determine the proper allocation of governmental authority within it.

In this case, there is no question that the disputed lands were within the Omaha Indian Reservation before the 1882 Act became law. Subsequent to the 1882 Act, Congress: (a) specifically resolved conflicting case law regarding the effect of allotment and surplus lands acts by defining Indian country to include all lands within a reservation, notwithstanding the issuance of any patent;[5] (b) recognized that under this definition reservations can include entire non-Indian communities;[6] and (c) affirmatively delegated authority to states and tribes to regulate the sale of liquor in Indian country.[7] In this context, to disregard or relegate to a subsidiary consideration whether Congress itself intended to preserve or diminish the Omaha Reservation in the 1882 Act would improperly displace Congress's constitutional authority over Indian affairs, authority this Court repeatedly has described as "plenary and exclusive." *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004). And, more specifically, to rely on the presence of a non-Indian community within the original reservation

---

[5] 18 U.S.C. § 1151.

[6] *Cf.* 18 U.S.C. § 1151 *with* 18 U.S.C. §§ 1154(c), 1156.

[7] 18 U.S.C. § 1161.

boundaries as a basis for a diminishment finding would be inconsistent with the very result Congress contemplated when it defined Indian country to include all lands within a reservation, notwithstanding the issuance of any patent.

ARGUMENT

I. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Would Upset Settled Expectations and Promote Unnecessary Litigation.

The test for determining whether an Indian reservation has been diminished by a statute opening lands for non-Indian settlement has been the subject of at least seven Supreme Court decisions since 1962: *Seymour v. Superintendent*, 368 U.S. at 351; *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. Dist. Cty. Ct. for the Tenth Judicial Cir.*, 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *Solem v. Bartlett*, 465 U.S. at 463; *Hagen v. Utah*, 510 U.S. 399 (1994), *reh'g denied*, 511 U.S. 1047 (1994); and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). In these cases, the Court determined that "'some statutes that opened Indian lands for settlement diminished reservations [while] others did not.'" *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469 (citations omitted)). Non-Indian land ownership does not by itself end reservation status: "Once a block of land is set aside for an Indian reservation

and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470.

To determine the effect of a particular surplus land act, the Court has developed a "'fairly clean analytical structure.'" *Hagen*, 510 U.S. at 410-11, (quoting *Solem*, 465 U.S. at 470). Under the Constitution, "Congress possesses plenary power over Indian affairs"; "[a]ccordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation." *Yankton*, 522 U.S. at 343 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and *Celestine*, 215 U.S. at 285).[8] Determining whether a particular act opening Indian lands for settlement diminished a reservation depends upon Congress's intent. *Id.*

In the above line of cases, the Court developed a three-pronged analysis to determine Congress's intent. The most probative evidence is the statutory

---

[8] *See also Lara*, 541 U.S. at 200 (describing Congress's constitutional authority over Indian affairs as "plenary and exclusive"); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (recognizing Congress's "plenary power over Indian affairs" in the context of defining Indian country); *Mazurie*, 419 U.S. 554 n.11 & 555 (referring to Congress's "exclusive constitutional authority to deal with Indian tribes" and noting that, in *Seymour*, Congress's authority to define Indian country broadly so as to include reservation lands patented in fee to non-Indians "went both unchallenged by the parties and unquestioned by this Court").

language itself, which is to be interpreted in accordance with the canons of construction applicable to laws affecting Indians. The language of the statute must clearly evince the intent of Congress to change the boundaries of a reservation. *Solem*, 465 U.S. at 470; *DeCoteau*, 420 U.S. at 447. The cases establish no precise language required for diminishment, but operative terms of absolute cession combined with payment of a sum certain are typically viewed as establishing a presumption of an intent to diminish, as is language which specifically restores opened land to the public domain. *Yankton*, 522 U.S. at 792; *Solem*, 465 U.S. at 470-71; *Hagen*, 510 U.S. at 414; *Seymour*, 368 U.S. at 354-55.

The second prong of the Court's analysis involves examination of the events surrounding passage of the act for evidence of a "widely-held contemporaneous understanding" that Congress intended reservation boundaries to be altered. *Solem*, 465 U.S. at 471. This requires review of the legislative history of the act, reports on negotiations of the land sale, executive and presidential declarations, reports of executive agencies overseeing Indian matters, and the like. *Id.*; *Rosebud*, 430 U.S. at 602; *Seymour*, 368 U.S. at 354-57 In the absence of a clear expression in statutory language relating to the intent of Congress, only unequivocal evidence contained in the surrounding circumstances will allow a finding of diminishment. *Yankton*, 522 U.S. at 351.

The third and least compelling prong of the Court's analysis involves examination of subsequent

jurisdictional and demographic history of the region opened for settlement. *Solem*, 465 U.S. at 471-72. This analysis allows for consideration of "practical advantages" from finding that a reservation remains intact or has been diminished, and can provide an "additional clue" as to what was foreseen by Congress in enacting the legislation at issue. *Id.* at 471-72 & n.12. However, subsequent history and demographics provides an "unorthodox and potentially unreliable method of statutory interpretation." *Id.* at 472 n.13. To result in diminishment, demographic and subsequent history must align with substantial and compelling evidence of Congress's intent to diminish as expressed in the statutory language and legislative history. *Id.* at 472.

In addition to the seven reservation boundary disputes that have been resolved by this Court under the three-part test summarized in *Solem*, many other such disputes have been resolved by the lower federal and state courts under that test. The following 21 federal cases involving 17 reservations are illustrative:

> *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (1906 Act disestablished Osage Reservation);
>
> *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009) (1871 Act diminished and 1906 Act disestablished Stockbridge-Munsee Reservation);

Shawnee Tribe v. United States, 423 F.3d 1204 (10th Cir. 2005) (1854 Treaty terminated Shawnee Reservation);

United States v. Webb, 219 F.3d 1127 (9th Cir. 2000) (1894 Act did not diminish Nez Perce Reservation);

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999) (1894 Act diminished but did not disestablish Yankton Sioux Reservation);

Melby v. Grand Portage Band of Chippewa, No. CIV 97-2065, U.S. Dist. LEXIS 24061; 1998 WL 1769706 (D. Minn. 1998) (1889 Act did not disestablish Grand Portage Indian Reservation);

Leech Lake Band v. Cass Cty., 108 F.3d 820 (8th Cir. 1997) (Leech Lake Reservation has never been disestablished or diminished), *aff'd in part and rev'd in part on other grounds*, 524 U.S. 103 (1998);

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996) (1886 Executive Order did not diminish Chehalis Indian Reservation);

Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994) (1910 Act did not diminish Fort Berthold Indian Reservation);

United States v. Standish, 3 F.3d 1207 (8th Cir. 1993) (1910 Act did not diminish Fort Berthold Indian Reservation);

Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990) (1908 Act and Executive Orders diminished Navajo Reservation);

Colorado River Indian Tribes v. Parker, 705 F. Supp. 473 (D. Ariz. 1989) (1908 Act did not remove Town of Parker from Colorado River Indian Reservation);

United States v. Grey Bear, 828 F.2d 1286 (8th Cir.), *reh'g denied*, 836 F.2d 1086, *reh'g granted, vacated in part*, 836 F.2d 1088 (1987) (1904 Act did not disestablish Devil's Lake Indian Reservation);

Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983) (Flood Control Acts did not diminish Lower Brule Sioux Reservation);

Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982) (1904 Act did not disestablish Flathead Reservation);

White Earth Band of Chippewa Indians v. Alexander, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir. 1982) (1889 Act diminished portion of White Earth Indian Reservation);

United States v. Minnesota, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (1889 Act diminished Red Lake Indian Reservation);

City of New Town, North Dakota v. United States, 454 F.2d 121 (8th Cir. 1972) (1910 Act did not alter boundaries of Fort Berthold Indian Reservation);

Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971) (1889 Act did not disestablish Leech Lake Indian Reservation);

Beardslee v. United States, 387 F.2d 280 (8th Cir. 1967) (Blackmun, J.) (Todd County portion of Rosebud Sioux Reservation not disestablished; land platted as addition to town of Mission in Todd County and owned by a non-Indian was within the Reservation); and

Ellis v. Page, 351 F.2d 250 (10th Cir. 1965) (Cheyenne and Arapaho Reservation disestablished).

Combining these cases with this Court's decisions, the Court's test for evaluating the effect of surplus lands acts has been applied by the federal courts to determine the status of at least 23 reservations.[9] The Court should not significantly revise or abandon that test in the interest of protecting what petitioners and their *amici* claim to be the settled expectations of

---

[9] For examples of additional state court cases *see, e.g.*, *State v. Romero*, 142 P.3d 887, 140 N.M. 299 (2006) (1924 Act did not alter Indian country status of Taos or Pojoaque Pueblos); *State v. Davids*, 194 Wis.2d 386, 534 N.W.2d 70 (1995) (1871 Act diminished Stockbridge-Munsee Reservation); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979) (1889 Act did not disestablish White Earth Reservation).

non-Indian communities. States, tribes, and local communities (both Indian and non-Indian) have a substantial interest in avoiding the disruptive effects of revising the Court's well-established approach. A revised test could reopen reservation boundary disputes that have long been settled, call into question criminal convictions premised on the existence or absence of Indian country, undermine cooperative agreements between tribes and local governments,[10] and promote renewed litigation. Under these circumstances, the interest in protecting settled expectations counsels in favor of preserving the Court's longstanding and widely applied approach to determining the effect of late-nineteenth and early-twentieth century surplus lands acts on reservation boundaries.

The potential for re-litigation of settled reservation boundaries is illustrated by the Brief for *Amici Curiae* Village of Hobart, Wisconsin and Pender Public Schools (hereinafter, Hobart and Pender Schools Br.). The brief asserts (at 2) that the Village of Hobart "has consistently argued the Oneida reservation has been disestablished," and (at 3-4) that the federal courts have definitively determined that the Oneida

---

[10] *See Nevada v. Hicks*, 533 U.S. 353, 393 (2001) (O'Connor, J., concurring) (noting the "host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 927 (1999).

Reservation has been diminished, citing cases from 1909 and 1933. However, it does not disclose that in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), the Village conceded the Oneida Reservation had not been disestablished. The court stated that "[t]he [Oneida] Tribe contends, *and the Village concedes*, that the Tribe's fee lands constitute 'Indian Country' within the meaning of this section [18 USC §1151]," a concession the court found "quite reasonable" in light of this Court's decision in *Seymour v. Superintendent*, 368 U.S. at 351. 542 F. Supp. 2d at 923 (emphasis added). The Hobart and Pender Schools brief also fails to mention *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013), where the court noted that "[t]he village [of Hobart] itself is an enclave in the [Oneida] tribe's reservation," that certain lands held in trust for the Oneida tribe were "within the boundaries of an Indian reservation," and that "[t]he non-Indian parcels in Hobart are technically part of the surrounding Oneida reservation as well." *Id.* at 838. The Village's apparent interest in re-litigating the existence of the Oneida reservation does not provide a compelling reason for the Court to revise its longstanding approach to the interpretation of surplus lands acts.

II. Changing the Court's Longstanding Test for Determining Whether a Surplus Lands Act Diminished a Reservation Is Unnecessary.

In 1948, Congress defined Indian country to include, *inter alia*, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. In adopting this definition, Congress was aware that it placed non-Indian communities within Indian country. Only one year later, it adopted a narrower definition of Indian country for purposes of statutes prohibiting the introduction or possession of liquor in the Indian country. For purposes of those statutes, Indian country "does not include fee-patented lands *in non-Indian communities* or rights-of-way through Indian reservations." 18 U.S.C. §§ 1154(c), 1156 (emphasis added). Unless the definition of Indian country in § 1151 included non-Indian communities, there would have been no need to exclude "fee-patented lands in non-Indian communities" from §§ 1154, 1156.

Notwithstanding Congress's understanding that Indian country can encompass non-Indian communities, petitioners and their *amici* assert that adverse consequences from including non-Indian communities within Indian country warrant a revision in this Court's longstanding approach to determining whether a surplus lands act diminished a reservation. However, changing this Court's approach is unnecessary for several reasons.

A. The *Solem* Test Already Permits Consideration of Post-Enactment Events.

First, the *Solem* test already permits consideration of events occurring after passage of a surplus lands act, and this Court has not hesitated to consider them in an effort to understand Congress's intent in passing the act. As the *Solem* Court explained:

> To a lesser extent, we have also looked to events that occurred after the passage of a surplus land act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.
>
> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. . . . In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected

> would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471-72 (citations and footnotes omitted).

The Court repeatedly has referenced post-statutory occurrences, often in considerable detail, in assessing whether a particular surplus lands act diminished a reservation. Focusing on events closer in time to the statute's enactment, the Court typically has examined patterns of settlement, assertions of jurisdiction, and actions and pronouncements of relevant agencies and subsequent Congresses. *See, e.g.*, *Seymour*, 368 U.S. at 356-57; *DeCoteau*, 420 U.S. at 442-44; *Rosebud*, 430 U.S. at 603-15; *Solem*, 465 U.S. at 478-81; *Hagen*, 510 U.S. at 420-21; *Yankton*, 522 U.S. at 354-57. No doctrinal change is necessary to permit this Court and the lower federal and state courts from doing what they already do in diminishment cases.

B. Petitioners and Their *Amici*'s Concerns Regarding the Inclusion of Non-Indian Communities within Indian Reservations Are Overstated and Misleading.

Second, the fears expressed by petitioners and their *amici* regarding the inclusion of non-Indian communities within Indian reservations are overstated and misleading. A NCAI statistical analysis of United States census data identified 138 non-Indian cities, towns and villages within Indian reservations

in 22 states (excluding tribal statistical areas in Oklahoma). *See* National Congress of American Indians, Policy Research Center, *Population and Land Area of Cities/Towns within Reservations or Oklahoma Tribal Statistical Areas* (2015), http://www.ncai.org/resources/ncai_publications/analysis-of-cities-and-towns-inside-reservations. Very few non-Indian communities have expressed the types of concerns raised by petitioners and their *amici* in this case, and in at least one case such concerns were expressly found to be unsubstantiated. *See Cty. of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 996 (D. Minn. 2003) (county's challenge to reservation boundary dismissed because county could not show any injury from tribe's assertion that its reservation had not been diminished), *aff'd*, 361 F.3d 460 (8th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004).

For their part, petitioners assert that, if this Court upholds the lower courts' decisions that the 1882 Act did not diminish the Omaha Reservation's boundaries, "the practical consequences will be profound for the residents of the disputed area after over one hundred years of justifiable reliance upon Nebraska and local governmental institutions and services." Brief for Petitioners at 20; *see also id.* at 52 (quoting *Hagen*, 510 U.S. at 420-21, for the proposition that "'when an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country *seriously burdens the administration of state and local governments*'") (emphasis added by

petitioners). However, apart from the application of the tribe's liquor ordinance – which, as noted above, was adopted pursuant to a delegation of authority by Congress as interpreted by the Eighth Circuit – petitioners do not identify *any* specific consequences for the residents of the disputed area in this case – profound or otherwise – and do not identify *any* state or local governmental institutions or services that will be disrupted or burdened in *any* way from a decision holding that the Omaha Reservation was not diminished. For several reasons, it is likely that there will be few such consequences or burdens.

First, although state civil jurisdiction over tribal members in Indian country is limited,[11] states have jurisdiction over non-Indians unless such jurisdiction is preempted by federal law or would unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980) (citation omitted). Under either of these tests, interactions between non-Indians are almost always within state and local jurisdiction, as are many interactions between non-Indians and tribal members. *See, e.g.*, *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1170 (10th Cir. 2012) (applying state laws to tobacco retailers on Indian reservation). Petitioners identify no state or local laws applicable to

---

[11] Some states, including Nebraska, have jurisdiction to adjudicate civil disputes involving Indians in Indian country pursuant to Public Law 280, 28 U.S.C. § 1360.

non-Indian residents of the disputed area, or any state or local services provided to such residents, which would be affected in any way by a decision that the Omaha reservation was not diminished.

Second, with respect to criminal jurisdiction, states have plenary jurisdiction over crimes between non-Indians in Indian country. *See New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946); *United States v. McBratney*, 104 U.S. 621, 624 (1882); *cf. Oliphant*, 435 U.S. at 195 (tribes lack criminal jurisdiction over non-Indians). In Public Law 280, 18 U.S.C. § 1162, Congress delegated federal criminal jurisdiction over crimes by or against Indians in Indian country to several states, including Nebraska. In 1969, the Nebraska legislature expressly "retroceded" to the United States "all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska," but retained jurisdiction over offenses involving the operation of motor vehicles on public roads or highways. Res. 37, 80th Leg., 1st Sess. (Neb. 1969). Thus, Nebraska took advantage of the reservation status of the area to relieve itself of the burden of prosecutions for major crimes; it did not view federal criminal jurisdiction in Indian country as disruptive or burdensome but as *beneficial*. Notably, in accepting the State's retrocession, the Department of the Interior gave a detailed description of the "Indian country located within the boundaries of the Omaha Indian Reservation in Thurston County," which referenced "the west boundary line of the Omaha Indian

Reservation as originally surveyed." Dept. of Interior, Notice of Acceptance of Retrocession Jurisdiction, 35 Fed. Reg. 16,598 (Oct. 24, 1970). Petitioners have launched no challenge to that definition for the past 45 years, undermining any claim that it imposes a serious burden on the administration of state or local government and creating a justifiable expectation by non-Indians and Indians that the area is Indian country.

Third, while the state has and will retain jurisdiction over non-Indians in the disputed area, tribal law will rarely govern non-Indians on non-Indian fee land. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders. . . . This general rule . . . is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians. . . . " *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tribe cannot impose hotel occupancy tax on guests at non-Indian hotel on non-Indian fee land; impact of non-member activity must be "demonstrably serious" and "imperil" the tribe for jurisdiction to exist).

For their part, *amici* Village of Hobart and Pender Schools claim that there are "significant and justified societal expectations" that will "result in severe disruptions to any governmental, business, and resident . . located within [the] . . . reservation." Hobart and Pender Schools Br. at 12, 18. They first focus on the potential for Indian-owned lands within

the disputed area to be freed from local zoning or other land use controls. *Id.* at 19-21 (citing *City of Sherrill*, 544 U.S. at 220). However, to support that concern, they cite a series of provisions in *Wisconsin statutes* that prohibit the application of such regulations to Indian-owned lands within Indian reservations. *Id.* at 21-24. The fact that the State of Wisconsin has chosen to limit the application of local land use laws within Indian reservations suggests that, at least in the judgment of the Wisconsin legislature, such limitations do not seriously burden the administration of state or local government.

Moreover, neither petitioners nor their *amici* point to any land use concerns involving the very few Indian lands in the disputed area in this case. Such concerns are unlikely given deeply rooted tribal interests in protecting reservation lands, which are reflected in cooperative agreements tribes have entered into with local governments in order to ensure effective land use regulations within their reservations. *See supra* note 10. And, should such concerns arise, state and local governments would not be powerless to address them. *Cf. Gobin v. Snohomish County*, 304 F.3d 909, 917 (9th Cir. 2002) (county could not regulate Indian land use within a reservation absent a showing of exceptional circumstances justifying displacement of tribal regulation), *with Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. at 923-26 (Village has authority to condemn and to impose special assessments on Indian fee land within Oneida Reservation).

The Village of Hobart and Pender Schools also focus on Congress's allocation of jurisdiction to protect the environment under the Clean Water Act and the Clean Air Act, but do not show that any issues regarding environmental jurisdiction have arisen in the disputed area in this case.[12] Hobart and Pender Schools Br. at 25-27. These hypothetical concerns are best addressed to Congress, which has established and can adjust the special statutory scheme allocating environmental authority in Indian country, taking into consideration legitimate federal, tribal, and state interests.

Finally, the Village of Hobart and Pender Schools cite several cases in which the courts have *rejected* tribal assertions of jurisdiction over local schools. Hobart and Pender Schools Br. at 28-29. They cite no similar assertions of jurisdiction in this case, and the cases they do cite indicate that assertions of jurisdiction over school districts such as Pender, which operates on fee lands, would be unsuccessful.

Notably, in asserting that the potential harms to a non-Indian community from being located within an Indian reservation warrant a revision in this Court's settled approach to determining the effect of surplus

---

[12] The claim that the Environmental Protection Agency "issued draft permitting authority to the Oneida [Tribe]," Hobart and Pender Schools Br. at 25-26, is mistaken. The cited permit was a draft NPDES permit issued *by EPA* to the Oneida Tribe for the Tribe's storm water discharges, and did not confer any "permitting authority" on the Tribe. *See id.* at 26 n.4.

lands acts on reservation boundaries, the Village of Hobart and Pender Schools fail to acknowledge the positive impacts of being included within an Indian reservation. For example, as of 2010 the Oneida Tribe, within whose reservation the Village of Hobart is located, was the fifth largest employer in Brown County, Wisconsin, employing 3085 people of whom 42% (1296) were non-native. *See* Wisconsin State Tribal Relations Initiative, *Oneida Nation of Wisconsin Tribal Profile*, 1 (2010), http://witribes.wi.gov/docview.asp?docid=5637&locid=57. The positive economic effects on surrounding communities of a wide variety of enterprises operated by 36 tribes around the nation are summarized in Mark Fogarty, "The Growing Economic Might of Indian Country," Indian Country Today, (March 15, 2013), http://indiancountrytodaymedianetwork.com/2013/03/15/growing-economic-might-indian-country-148196. These benefits include direct employment, opportunities for non-Indian contractors and service providers, development of community infrastructure, increased federal, state and local tax revenues, and other spillover effects. Reservation status assists in securing these benefits because (among other things) the federal government provides tax benefits for reservation businesses. *See, e.g.*, 26 U.S.C. § 168(j).

Petitioners and their *amici* also fail to acknowledge that many tribes, states and local governments have addressed the types of concerns that they raise here through intergovernmental agreements. Both the Omaha Tribe, whose reservation is at issue in this

case, and the Oneida Tribe, about whose reservation the Village of Hobart complains, have entered into a number of such agreements.[13] These agreements

---

[13] The Omaha Tribe entered into these agreements, among others:

1. *Interlocal Agreement for the Formulation of the Northeast Nebraska Enterprise Zone Association under the Nebraska Enterprise Zone Act* (1994), http://omaha-nsn.gov/wp-content/uploads/2013/06/Appendix-I-Northeast-Nebraska-Enterprise-Zone-Association.pdf;
2. *Child Welfare, Adult and Child Protection and Safety Services, and Juvenile Services Contract* (2011), http://dhhs.ne.gov/children_family_services/Contracts/47253O4OmahaAPSCPS.pdf;
3. *Indian Child Welfare, Adult and Child Protections and Safety Services, and Juvenile Service Agreement* (2010), http://dhhs.ne.gov/children_family_services/Contracts/36969O4Omaha2010.pdf; and
4. *Agreement for the Collection and Dissemination of Motor Fuel Taxes* (2005), http://revenue.nebraska.gov/fuels/legal/Agreement%20with%20Omaha%20Tribe%20Sept%202005.pdf.

The Oneida Tribe has entered into these agreements, among others:

1. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and City of Green Bay* (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CityofGreenBayServiceAgreement.pdf (reciting that the "Tribe and the City have been good neighbors and desire the spirit of cooperation between the two governments to continue");
2. *Cooperation Agreement* [*with the City of Green Bay*] (1984), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/CITYof

(Continued on following page)

GreenBayOHACooperationAgreement.43184.pdf (providing for tribal payments in lieu of City taxes);

3. *Exchange of Services Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County* (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyExchangeofServicesAgreement.pdf (providing for tribal payments in lieu of county taxes and reciting that "the Tribe and the County enjoy a relationship of mutual trust and respect");

4. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Brown County* (2008), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/BrownCountyServiceAgreementandAmendments.pdf (relating to construction of telecommunications structures and reciting that "the Tribe and the County enjoy a relationship of mutual trust and respect");

5. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Town of Oneida* (2012), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/TownofOneidaServiceAgreement.07.27.2012.pdf (reciting that the "Tribe and the City have been good neighbors and desire the spirit of cooperation between the two governments to continue");

6. *Intergovernmental Service Agreement Between Oneida Tribe of Indians of Wisconsin and Outagamie County Drainage Board* (2009), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/OutagamieCountyDrainageBoardIntergovernmentalService.pdf (reciting that "the Tribe and the Board have been good neighbors and desire the spirit of cooperation between the two governments to continue"); and

7. *Service Agreement Between Oneida Tribe of Indians of Wisconsin and Village of Ashwaubenon*

(Continued on following page)

provide a mechanism for sovereigns to resolve the kind of disruption petitioners and their *amici* fear and, instead, to provide for *enhanced* governmental services and facilities within a reservation.[14] As the Seventh Circuit recently observed, "the Village [of Hobart] doesn't . . . deny the feasibility of cooperative arrangements between it and the tribe, which has signed cooperative service agreements with other government bodies in the area." *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 732 F.3d at 841. This Court itself has indicated that cooperative agreements are the preferred method of balancing the interests of states and tribes within Indian country. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991). Justice O'Conner listed examples of such agreements in *Hicks*, 533 U.S. at 393 (O'Connor, J., concurring).

Petitioner State of Nebraska expressly authorizes state agencies to enter into intergovernmental agreements with tribes in Neb. Rev. Stat. § 13-1501 *et seq.* (the State-Tribal Cooperative Agreements Act),

---

(2013), https://oneida-nsn.gov/uploadedFiles/wwwroot/Government/Laws_and_Policies/Service%20Agreement%20with%20Ashwaubenon%202014.pdf (reciting that "the Tribe and the Village have been good neighbors and desire the spirit of cooperation between the two governments to continue").

[14] They also provide an alternative to the "threat of protracted and expensive litigation." Hobart and Pender Schools Br. at 29 n.5.

and has availed itself of this option. *See, e.g.*, *Cross-Deputization Agreement By and Between the Bureau of Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska* (2001), https://www.walkingoncommonground.org/state.cfm?topic=12&state=NE. More than 20 states have recognized the advantages of these agreements, adopting legislation authorizing state and local agencies to enter into intergovernmental agreements with tribes. *E.g.*, Ariz. Rev. Stat. § 11-952; Minn. Stat. § 471.59(1); Mont. Code Ann. § 18-11-101 *et seq.*; Okla. Stat. tit. 74 § 1221; SDCL 10-12A; Wyo. Stat. § 16-1-101.

In sum, the concerns expressed by petitioners and their *amici* are overstated and misleading, and provide no basis for altering this Court's well-established and widely applied approach to determining the effects of late-nineteenth or early-twentieth century surplus lands acts on reservation boundaries.

III. Petitioners' and Their *Amici*'s Attempts to Distort or Replace This Court's Long Established Approach to Determining the Effect of a Surplus Lands Act Would Improperly Displace Congress's Constitutional Role in Indian Affairs.

There is a third problem with petitioners' and their *amici*'s requests to distort or replace this Court's longstanding approach to determining the effect of surplus lands acts. Petitioners want to place greater weight on the third *Solem* factor, which has the least evidentiary value in ascertaining Congress's intent.

Their *amici* want to disregard Congress's intent altogether if the area in question allegedly lacked sufficient Indian character over a long period of time. Each request would displace Congress's plenary constitutional authority to determine reservation boundaries and define Indian country. This would be a radical departure from this Court's precedents and cannot be justified in the interests of protecting settled expectations.

A. Petitioners' Attempt to Change the Weight Given to the *Solem* Factors Is Inconsistent with Sound Principles of Statutory Construction.

The Court has consistently limited reliance on post-statutory events under the *Solem* test, especially events occurring long after passage of the statute to be interpreted, because the controlling factor is congressional intent. For example, in *Solem* the Court explained that, while subsequent events might "[t]o a lesser extent" provide a "clue" as to Congress's intentions, the use of post-enactment events as a tool of statutory interpretation is "unorthodox and potentially unreliable," and should be employed only as "a necessary expedient" where other evidence of congressional intent is lacking. *Solem*, 465 U.S. at 471-72 n.13 (citation omitted).

Indeed, the Court has noted that, especially over long periods of time, post-enactment events and pronouncements often embody conflicting and

inconsistent interpretations and approaches. In *Yankton*, the Court noted that over the years following the surplus lands act at issue in that case, "both Congress and the Executive Branch have described the reservation in contradictory terms and treated the region in an inconsistent manner." 522 U.S. at 354. "The mixed record we are presented with 'reveals no consistent, or even dominant, approach to the territory in question,' and it 'carries but little force'" when compared with the other two prongs of the *Solem* analysis. *Id.* at 356 (quoting *Rosebud*, 430 U.S. at 605 n.27). *Solem* itself found that the post-enactment record of subsequent treatment of the contested territory was so "rife with contradictions and inconsistencies as to be of no help to either side." 465 U.S. at 478.

In *Hagen*, this Court similarly found, after reviewing post-statutory events, that "[t]he subsequent history is less illuminating than the contemporaneous evidence." *Hagen*, 510 U.S. at 420. In reviewing inconsistent approaches that a subsequent Congress took with regard to the contested lands, the Court stated that this reinforced the Court's longstanding observation that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Id.* (citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 348-49 (1963)); *see also Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991) (subsequent legislative history is "an unreliable guide to legislative intent").

Finally, as a practical matter, the Court noted in *Yankton* that the mere surge of non-Indian settlement and the resulting lessening of the Indian character of opened lands following a surplus lands act is insufficient in itself to be determinative of Congress's intent in passing the law: "This final consideration [post-enactment occurrences] is the least compelling for a simple reason: Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." *Yankton*, 522 U.S. at 356.

Petitioners' request to give greater weight to the third *Solem* factor disregards these considerations and, by elevating the factor that is *least* probative of Congress's intent, would effectively displace Congress's constitutional authority to define Indian country and determine reservation boundaries. *See supra* note 8 and accompanying text; *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("in every case [the Court] must respect the role of the Legislature, and take care not to undo what it has done").

The Court has never suggested that *Solem*'s third factor can be used in this manner. In *Solem*, where the Court noted that there might be practical advantages from a finding that a reservation was (*or was not*) diminished, 465 U.S. at 471 & n.12, it went on to hold that there were "limits to how far we will go to decipher Congress's intention in any particular surplus land act." *Id.* at 472. In particular, "[w]hen

both an Act and its legislative history fail to provide substantial and compelling evidence of *a congressional intention* to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening." *Id.* (emphasis added). Similarly, in *Hagen*, where the Court quoted *Solem*'s observation regarding burdens on state and local governments if an area of Indian country is largely populated by non-Indians, 510 U.S. at 420-21, it did so in the context of an inquiry into congressional intent: "our conclusion that the statutory language and history indicate *a congressional intent* to diminish is not controverted by the subsequent demographics of the Uintah Valley area." *Id.* at 420 (emphasis added).

Where, as here, the controlling inquiry is one of congressional intent, the Court should not revise its longstanding approach to place greater weight on the evidence that is least probative of congressional intent.

B. The Court Should Not Abandon the *Solem* Test in Favor of a Test Based on *City of Sherrill* that Ignores Congressional Intent.

Amici Village of Hobart and Pender Public Schools go much further than petitioners and argue that, regardless of Congress's intent to preserve or diminish a reservation in a surplus lands act, tribes

should simply be barred from asserting any jurisdiction whatsoever in areas that allegedly lacked sufficient Indian character since the passage of the act. They invoke *City of Sherrill*, 544 U.S. 197 (2005), a case that involved efforts by a tribe to assert sovereignty in the form of an immunity from taxation on lands from which it had been displaced more than 200 years ago through violation of the Indian Non-Intercourse Act of 1790, 25 U.S.C. § 177. However, *City of Sherrill* has never been applied to ignore Congress's intent to preserve or diminish a reservation in a late-nineteenth or early-twentieth century surplus lands act. In the name of "preserving settled expectations," *amici* Village of Hobart and Pender Public Schools would not only jettison the analytical approach this Court has applied to reservation diminishment cases over the past half-century, but would eliminate, in favor of the judiciary, Congress's constitutionally mandated role in regulating Indian affairs, including its authority to define Indian country and to establish and diminish reservations. *See supra* note 8 and accompanying text.

In *City of Sherrill*, this Court held that the Oneida Tribe could not unilaterally revive its ancient sovereignty, including immunity from state taxation of fee land it purchased on the open market, within territory it ceased to occupy or govern two centuries earlier. *See City of Sherrill*, 544 U.S. at 203. The Court acknowledged that the Tribe might have suffered a great wrong when its lands were sold in violation of the Non-Intercourse Act, but held that it

was not entitled to a remedy due to equitable considerations, including massive changes in the lands at issue since the founding days of the Republic, nearly two hundred years of acquiescence to non-Indian jurisdiction on the part of the Tribe, and the extreme disruption to the justified expectations of others that would result from such a remedy. *Id.* at 213-21.

The Court's opinion in *City of Sherrill* contains no suggestion that the Court no longer adhered to the three-pronged analysis summarized in *Solem* and applied in its seven cases regarding the effect of late-nineteenth and early-twentieth century surplus lands acts on reservation boundaries. The Court did not question Congress's paramount role in establishing or diminishing reservations, or the relevance of Congress's intent in enacting surplus land laws. To the contrary, the *City of Sherrill* opinion cited *Solem*, *Rosebud* and *Hagen*. *City of Sherrill*, 544 U.S. at 215-16 & n.9. The Court stated that in "the different, but related, context of the diminishment of an Indian reservation," the longstanding assumption of jurisdiction by a state over an area that is overwhelmingly non-Indian may create justifiable expectations of reservation diminishment. *Id.* at 215. There was no suggestion, however, that such expectations would by themselves trump Congress's intent. Rather, in the context of New York's uncontested 200-year exercise of jurisdiction in former Oneida territory, such justifiable expectations "merit[ed] heavy weight." *Id.* at 215-16.

No other court has applied *City of Sherrill* to avoid the *Solem* test in a case involving a late-nineteenth or early-twentieth century surplus land act. Although *City of Sherrill* has been cited in recent diminishment cases, it has not been employed as an excuse to ignore Congress's intent. For example, in *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), cited by *amici* Village of Hobart and Pender Public Schools, the Tenth Circuit explicitly followed the *Solem* test. As part of its discussion of the third prong of the *Solem* analysis, the Tenth Circuit noted that the Osage Nation conceded that Oklahoma had long asserted jurisdiction in Osage County, now a predominantly non-Indian area, and that this might have created "justifiable expectations" that "merit heavy weight." *Osage Nation*, 597 F.3d at 1128. Ultimately, however, the court did not bar the Osage Nation's claims based on laches. Instead, it concluded that the Osage reservation had been disestablished *by Congress*. *Id.* at 1127-28.

The resort to equitable principles to thwart Congress's intent in a surplus lands act is particularly inappropriate given Congress's affirmative legislation in this area. Congress's 1948 definition of Indian country was specifically intended to resolve issues that had arisen from allotment and surplus lands acts, "consolidat[ing] numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law." 18 U.S.C. § 1151 note. One of the conflicts Congress addressed was whether reservation lands patented in fee to Indians

or non-Indians pursuant to allotment and surplus lands acts were "within the limits of [an] Indian reservation" for purposes of the Act of March 3, 1885, § 9, 23 Stat. 362, 385 (Major Crimes Act). Two federal courts held they were, *see Kills Plenty v. United States*, 133 F.2d 292 (8th Cir. 1943); *United States v. Frank Black Spotted Horse*, 282 F. 349 (D.S.D. 1922), while some state courts held they were not. *See, e.g.*, *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933). By defining Indian country to include all lands within a reservation, "notwithstanding the issuance of any patent," 18 U.S.C. § 1151, Congress's 1948 definition followed *Kills Plenty*, which held that an offense committed within the town-site of Mission, South Dakota, was within a reservation even though the Indian title to the town-site had been extinguished. *See* 18 U.S.C. § 1151 note (citing *Kills Plenty* in list of cases on which the definition was based). Moreover, as discussed above, in amending the liquor statutes in 1949, Congress recognized that its definition of Indian country could include not just fee-patented non-Indian lands, but entire non-Indian communities established within Indian reservations as a result of allotment and surplus lands acts. *See* 18 U.S.C. §§ 1154(c), 1156. It would be strange if the very result contemplated by Congress in defining Indian country – the inclusion of non-Indian communities within Indian reservations subjected to allotment or surplus lands acts – could serve as the basis for the invocation of equitable principles that led to the opposite result.

It is also noteworthy that the specific assertions of tribal authority at issue in *City of Sherrill* and this case have each been addressed by Congress in its Indian country, allotment and surplus lands legislation. As noted above, in allotment and surplus lands acts, Congress has made lands patented in fee subject to state and local taxation, *see Cass Cty.*, 524 U.S. at 103, and in 18 U.S.C. §§ 1154, 1156, and 1161 it has specifically addressed federal, state and tribal liquor regulation within Indian country. Accordingly, this case would be a particularly inappropriate case in which to discard this Court's long-established approach to the interpretation of surplus lands acts, with its premise that only Congress can diminish an Indian reservation, and to resort instead to equitable principles that disregard Congress's intent to preserve or diminish a reservation.

CONCLUSION

For the above reasons as well as those given by respondents, the Court should decline the invitation by petitioners and their *amici* to distort or replace this Court's well-established approach to determining

the effect of allotment and surplus lands acts on the boundaries of an Indian reservation.

Respectfully submitted,

MARC D. SLONIM
Counsel of Record
RICHARD M. BERLEY
ZIONTZ CHESTNUT
2101 Fourth Avenue, Suite 1230
Seattle, WA 98121
(206) 448-1230
mslonim@ziontzchestnut.com

DONALD R. WHARTON
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760
wharton@narf.org

JOHN DOSSETT
NATIONAL CONGRESS OF
AMERICAN INDIANS
1516 P Street NW
Washington, DC 20005
(202) 466-7767
John_Dossett@NCAI.org
Counsel for the National
Congress of American Indians

Counsel for Amici Curiae

No. 14-1406

IN THE
Supreme Court of the United States

NEBRASKA, ET AL.,

Petitioners,

v.

MITCH PARKER, ET AL.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF FOR *AMICUS CURIAE* VILLAGE OF HOBART, WISCONSIN AND PENDER PUBLIC SCHOOLS IN SUPPORT OF PETITIONERS

FRANK W. KOWALKOWSKI
Counsel of Record
DILLON J. AMBROSE
DAVIS & KUELTHAU, S.C.
318 S. Washington St.
Suite 300
Green Bay, WI 54301
Main: 920.435.9378
Direct: 920.431.2221
fkowalkowski@dkattorneys.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. *City Of Sherrill* Compels Reversal 6

II. The Scope Of *City Of Sherrill* Is Expansive 11

III. This Case Contains Factors Identical To Those Used By *City Of Sherrill* To Preclude The Resuscitation Of Sovereign Control 16

IV. Affirmation Of The Decision Below Will Result In Severe Disruptions To Any Government, Business, And Resident Individually Located Within An Ancient Reservation 18

A. Courts Have Consistently Confirmed The Disruptive Effects Of Re-Establishing Sovereign Control Over An Ancient Reservation Land 19

B. Re-Establishing Sovereign Control Over Ancient Reservation Land Will Result In Numerous And Varied Losses Of State Jurisdiction 21

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Belcourt Pub. Sch. Dist. v. Davis,

786 F.3d 653 (8th Cir. 2015) 28

Belcourt Pub. Sch. Dist. v. Davis,

997 F.Supp.2d 1017 (D. N.D. 2014) 28

Cayuga Indian Nation Of New York, et al. v. Pataki,

413 F.3d 266 (2d. Cir. 2005) 6, 10, 11, 12

Cayuga Indian Nation v.. Village Of Union Springs,

390 F. Supp.2d 203 (N.D.N.Y. 2005) 19, 20

City Of Sherrill v. Oneida Indian Nation Of New York,

544 U.S. 197 (2005) ..... Passim

Fort Yates Public School Dist. No. 4 v.. Murphy ex rel. C.M.B.,

786 F.3d 662 (8th Cir. 2015) 28

Oklahoma Dept. Of Environmental Quality v. E.P.A.,

740 F.3d 185 (D.C. Cir. 2014) 26, 27

Oneida Indian Nation Of New York v. Cty. Of Oneida,

617 F.3d 114 (2d. Cir. 2010) 10, 12, 13

Osage Nation v. Irby,

597 F.3d 1117 (10th Cir. 2010)..... 10

Red Mesa Unified School Dist. v. Yellowhair,

2010 WL 3855183 (D. Ariz. Sep. 28, 2010) 28

Shawnee Tribe v. U.S.,

423 F.3d 1204 (10th Cir. 2005)..... 10

Smith v. Parker,

774 F.3d 1166 (8th Cir. 2014)..... 5

Smith v. Parker,

996 F.Supp.2d 815 (D. Neb. 2014)..... 5

Solem v. Bartlett,

465 U.S. 463 (1984)..... 4, 6, 7, 15

South Dakota v. Yankton Sioux Tribe,

522 U.S. 329 (1998)..... 14, 15

Stevens v. County Of Brown,

Case No. 307 (E.D. Wis. Nov. 3, 1933). 3

Stockbridge-Munsee Cmty. v. State Of New York,
756 F.3d 163 (2d. Cir. 2014) 10, 20

U.S. v. Hall,
171 F. 214 (1909) 2

STATUTES

33 U.S.C. § 1342 25

33 U.S.C. § 1251 *et seq* 25

42 U.S.C. § 7401 26

Wis. Stat. § 165.92(1)(a) 23

Wis. Stat.§ 165.92(2)(b) 24

REGULATIONS

Wis. Admin. Code ATCP § 93.010(1) 22

Wis. Admin. Code ATCP § 93.020(6)(u) 22

Wis. Admin. Code SPS § 314.01(1)(c)(3)(a) 22

Wis. Admin. Code SPS § 318.1001 23

Wis. Admin. Code SPS § 318.1003(1)(d)1..... 23

Wis. Admin. Code SPS § 360.01 23

Wis. Admin. Code SPS § 360.10 23

Wis. Admin. Code SPS § 360.10(2)(c) 23

Wis. Admin. Code SPS § 361.01 22

Wis. Admin. Code SPS § 361.02(3)(b)..... 22

OTHER AUTHORITIES

2015 Village of Hobart Operating Budget, adopted Nov. 25, 2014, http://www.hobart-wi.org/ (follow "Finance and Budget", then "Annual Village Operating Budget") 29

Phil Ferolito, Yakamas seek operating licenses from non-tribal entities, Yakima Herald (Jun. 1, 2015) http://www.yakimaherald.com/news/local/yakamas-seek-operating-licenses-from-nontribal-entities/article_309c94fc-079a-11e5-8799-c3ac88f80414.html 31

Oneida Tribe of Indians of Wisconsin, Resolution and Statement of Effect FY2015 Budget, http://oneidaeye.com/wp-content/uploads/2015/01/OTIW-FY2015-Resolution-Statement-of-Effect.pdf 29

Standing Rock Sioux Tribe Tax Department, Letter to Business Owners, http://tax.standingrock.org/data/upfiles/programs/files/Dear%20Owners%20Revised.pdf 30

U.S. Envt'l Protection Agency, Public Notice of Draft NPDES Permits to discharge into waters of the United States, http://www3.epa.gov/region5/water/npdestek/pdfs/pnofwims4prmts.pdf. 26

STATEMENT OF INTEREST

The Village of Hobart is a Wisconsin municipality that lies wholly within land claimed to be part of the Oneida Tribe of Indians of Wisconsin's reservation. Pender Public Schools is a public school district located in Pender, Nebraska, which operates on the land the Omaha Tribe is claiming, in this case, is within its reservation.[1]

While hundreds of miles and several states separate these municipal entities, they share a common concern. Like so many other state and local governments within this country, they both lie within land that used to be designated as a reservation, but long ago lost any semblance of being Indian Country. More than a century ago, these municipal entities began exercising their jurisdiction, without tribal or federal interference over this land. This long-settled state jurisdiction is now being threatened by the ever expanding attempts by tribal governments, often with the aid of

---

[1] This *amici* brief is presented pursuant to this Court's Rule 37. The parties have consented to this brief and their consents have been filed with this Court. Pursuant to this Court's Rule 37.6, counsels of record for the *amici* represent they authorized this brief, no counsel for either party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparations or submission of this brief. No person or entity other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

the federal government, to re-create long ago diminished reservations.

Obviously, Pender and the Pender Public Schools will be directly affected by whether this Court determines diminishment of the Omaha reservation has occurred. As a result of treating the land as reservation land, school districts and other important community services that rely on local and state tax revenue will be more susceptible to loss of funding and face federal and tribal regulation, hampering their ability to operate under the principle of subsidiarity—that the people of Pender, and their duly-elected school board, know what is best for their children. Potential changes to how the school district is operated and its curriculum will also negatively affect the population in the affected area and, in turn, the area's economy.

Hobart and every similarly-situated municipal entity that happens to be on historic reservation land, despite longstanding and uninterrupted state governance, will also be severely disrupted by an affirmance of the lower court's decision. Hobart has consistently argued the Oneida reservation has been disestablished.

Not only does the historical record confirm the Oneida reservation in Wisconsin has been disestablished, this fact has also been confirmed by two federal judges. In 1909, a federal court held "[t]he jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states." *U.S. v. Hall*, 171 F. 214, 218 (1909). In 1933,

a federal court stated, "[t]herefore, there is no escape from the proposition that the government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the land in the towns in question." *Stevens v. County of Brown*, (C.A. No. 307) (E.D. Wis., November 3, 1933).

Despite these holdings and facts, Hobart finds itself still litigating this issue and fighting to maintain its sovereign control. The Oneida's claim to a reservation and to sovereign control has led to constant jurisdictional disputes relating to taxation, zoning, city planning, policing, public services, and environmental issues. The Oneida will not only take an affirmance of the Eight Circuit's decision as a license to continue efforts to assert its sovereign control over Hobart and its residents, it will enhance those efforts, further disrupting Hobart's ability to govern. A reversal, however, will restrict the Oneida's sovereign control to only those parcels that have been placed into trust through the Indian Reorganization Act (IRA) and ensure the Oneida does not expand its reach to include all of Hobart and its non-tribal residents and businesses.

The amici thus submit this brief to offer their perspectives as municipal entities that will be dramatically harmed by re-creating tribal jurisdiction in areas that have been exclusively under the amici's jurisdiction for generations.

The Village and school system agree with the arguments advanced by the Petitioners. However, the purpose of this amicus brief is to advance a related but alternative argument, which also leads to the conclusion the Omaha Reservation has been diminished. This amicus brief also serves to illustrate the disruptive effect of allowing a tribe to reestablish jurisdiction over land long ago abandoned on local governmental entities, their businesses, and their individual residents.

SUMMARY OF ARGUMENT

City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) dramatically altered the legal landscape against which tribal land claims are considered and compels the reversal of the lower court's decision. *City of Sherrill* holds an alternative, equitable basis exists to conclude diminishment of a reservation has occurred, separate from the congressional intent analysis under *Solem v. Bartlett*, 465 U.S. 463 (1984). *City of Sherrill* provides that, when state jurisdiction in an area that is distinctly non-Indian in character remains unquestioned for generations, a tribe may not unilaterally re-create its reservation. Because the precise situation found in *City of Sherrill* exists in this case, the Court, consistent with *City of Sherrill*, should prevent the Omaha Tribe from unilaterally reviving its ancient sovereignty, in whole or in part, over that part of the former Omaha Reservation that once existed west of the railroad right-of-way.

ARGUMENT

The lower courts erred by analyzing subsequent demographic and jurisdictional evidence *only* under the third factor of *Solem*, as it relates to evidence of congressional intent of diminishment, and not *also* as substantive proof of equitable diminishment, as recognized by *City of Sherrill*. Evidence supporting equitable diminishment will almost always overlap with evidence supporting the third *Solem* factor, a *post hoc* finding of congressional intent of diminishment derived from demographic evidence such as land use, the Indian or non-Indian character of the area and populace, and the existence or duration of consistent and undisturbed state governance. Yet, the lower courts refused to credit this evidence, claiming *Solem* precludes its use in the absence of some expression or evidence of congressional intent. *See Smith v. Parker*, 996 F.Supp.2d 815, 844 (D. Neb. 2014) ("Even if this demographic evidence did establish diminishment, it cannot overcome my conclusion that the language of the 1882 Act itself does not clearly evince Congress' intent to diminish the Omaha Reservation."); *Smith v. Parker*, 774 F.3d 1166, 1168 (8th Cir. 2014) ("Based on our de novo review, we discern that the district court has thoroughly, thoughtfully, and accurately considered the evidence in light of the guideposts provided by the Supreme Court [in *Solem*] as well as this court."). Not only have the lower courts misinterpreted *Solem*, to unduly limit, if not completely preclude use of this demographic evidence as part of the congressional intent analysis, they failed to properly apply *City of Sherrill*, which

compels the use of this evidence *even in the absence of clear congressional intent.*

I. *City Of Sherrill* Compels Reversal.

The lower courts failed to apprehend the import of *City of Sherrill* which "dramatically altered the legal landscape" against which tribal land claims are considered. *Cayuga Indian Nation of New York, et al. v. Pataki, et al.*, 413 F.3d 266, 273 (2d. Cir. 2005), cert. denied, 547 U.S. 1128 (2006). Prior to the holding in *City of Sherrill*, the means to diminish a reservation was through congressional action. *See* generally *Solem*, 465 U.S. 463. As emphasized in *Solem*, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470. *City of Sherrill* alters that analysis by providing an alternative to congressional diminishment—equitable diminishment.

The decisions of the lower courts identify the *Solem* factors as the exclusive analysis in determining whether a reservation has been diminished, completely ignoring this Court's subsequent holding in *City of Sherrill*. *Solem* examines whether *congressional intent* of diminishment exists by (1) looking at the statutory language of certain acts for specific evidence of intent to diminish; (2) reviewing the historical context at the time of the act for evidence of intent to diminish; and (3) reviewing the events that occurred after the passage of the act, including "Congress's own treatment of the affected areas," "the manner in

which the Bureau of Indians Affairs and local judicial authorities dealt with unallotted open land," while also recognizing that "who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation." *Solem*, 465 U.S. at 471. *Solem* also acknowledged that "*de facto*, if not *de jure*, diminishment" may occur under this third factor, and that the Court will "look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.*, at 471-72.

While the evidence relevant to the third factor of *Solem* substantially overlaps the evidence used to find equitable diminishment in *City of Sherrill*, *City of Sherrill* does not simply restate the third factor of *Solem*. Instead, it provides that a tribe may lose sovereign control over ancient reservation land, regardless of congressional intent, when that area has long been regulated, governed, and populated by non-Indian inhabitants.

City of Sherrill held "this long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Oneidas] from gaining the disruptive remedy it now seeks." *City of Sherrill*, 544 U.S. at 216-17. The Court came to this conclusion despite the absence of any Congressional Act diminishing the Tribe's original reservation, or

otherwise removing or limiting the Tribe's historic sovereign control over the land.

Invoking traditional theories of equity, the Court found "the distance from 1805 to the present day, the Oneida's long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221. Accordingly, this Court held "'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

Justice Stevens' dissent in *City of Sherrill* confirms the practical effect of the majority's holding by noting: "the Court has done what only Congress may do—it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 224-25 (Stevens, J. dissent). The majority was cognizant of Justice Stevens' dissent and concluded equity provides another means to diminish a tribe's sovereign authority over ancient reservation land. Specifically, the Court held "the Court need not decide today whether . . . the 1838 Treaty of Buffalo Creek disestablished the Oneida's reservation as Sherrill argues . [t]he relief [the Oneida] seeks . is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future

disruptions such relief would engender." *Id.* at 215, n.9. In other words, congressional intent did not matter in *City of Sherrill* because reinstitution of the Tribe's sovereign authority was "unavailable" for a completely different reason.

In *City of Sherrill*, regardless of whether a reservation existed or Congress intended to diminish a Reservation, "the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneida's long delay in seeking judicial relief against parties other than the United States" provided equitable diminishment. *Id.* at 198.

While demographic evidence may be the "least compelling" factor in *Solem's* "congressional intent" diminishment analysis, that evidence stands on its own under the *City of Sherrill* analysis. Drawing the analysis away from the underlying treaty and Congressional action, *City of Sherrill* held, "when a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are *prime considerations.*" *Id.* at 200. (emphasis added).

This analysis has subsequently been examined and accepted by other courts: "[I]n the wake of this trilogy – *Sherrill*, *Cayuga*, and *Oneida* – it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance

and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility."[2] *Stockbridge-Munsee Cmty. v. State of New York, et al.*, 756 F.3d 163, 165 (2d. Cir. 2014).[3]

Failing to adhere to the *Stockbridge-Munsee Community* interpretation, the lower courts in this case refused to credit this demographic and jurisdictional evidence, claiming *Solem* precludes its

---

[2] The Second Circuit was referring specifically to *City of Sherrill*, 544 U.S. 197; *Cayuga Indian Nation*, 413 F.3d 266 and *Oneida Indian Nation of NY v. Cty. of Oneida*, 617 F.3d 114 (2d. Cir. 2010), cert. denied, ____ U.S. ____, 132 S.Ct. 452 (2011).

[3] Despite this Court's firm holding that equitable diminishment may result from demographic and jurisdictional history alone, even in the absence of congressional intent to diminish, at least one other federal appellate court has seemingly questioned this Court, stating it would ignore demographic and jurisdictional history in the absence of congressional intent to diminish. *See Osage Nation v. Irby*, 597 F.3d 1117, 1122 (10th Cir. 2010) (In other words, "subsequent events and demographic history can support and confirm other evidence but cannot stand on their own.") (citation omitted); *see also Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1223 (10th Cir. 2005) (looking to an area's subsequent demographic history "will not substitute for failure of the instrument's language *or* contemporaneous history to evidence an intention to terminate all or some of the reservation.") (emphasis added.) In both cases, however, the court found the reservations were disestablished. The court did not rely on *City of Sherrill* however, or the Second Circuit's treatment of *City of Sherrill*, in which "subsequent events and demographic history" did stand on its own.

use in the absence of some expression or evidence of congressional intent. Again, *City of Sherrill* does not fall under the third factor of *Solem*; it provides a different, alternative test that precludes reestablishment of sovereign control. The lower courts erred by failing to recognize or analyze *City of Sherrill* in light of the clear applicability to this case.

II. The Scope Of *City Of Sherrill* Is Expansive.

As noted by the Second Circuit, the broad pronouncements in *City of Sherrill* preclude limiting its application:

> The Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself. See *id.* at 1483 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns."); *Id.* at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks."); *id.* at 1491 n.11 ("[The Oneidas'] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality."). Although we recognize that the Supreme Court did not identify a formal standard for

> assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

Cayuga Indian Nation of New York, 413 F.3d at 274.

Five years later, the Second Circuit had another opportunity to revisit the holding of *City of Sherrill* in *Oneida Nation of New York v. County of Oneida*, 617 F.3d 114 (2d. Cir. 2010). The Second Circuit confirmed it is the disruptive nature of the claim itself that controls whether or not the claim may be barred by laches, acquiescence or impossibility:

> The equitable defense recognized in *Sherrill* and *Cayuga* is not limited to "possessory" claims – to claims premised on the assertion of a current possessory right to tribal lands held by others on the theory that the original transfer of ownership of the lands was in some way flawed. Rather, the defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief. See *Sherrill*, 544 U.S. at 215 n.9, 125 S.Ct. 1478 ("The relief [the New York Oneidas] seek [ ]

> ... is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender.").

Oneida v. Oneida County, 617 F.3d at 135.

The Second Circuit continued:

> Under the reasoning employed in *Cayuga*, then, the equitable defense originally recognized in *Sherrill* is potentially applicable to *all* ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought.

Id. at 136. (emphasis added).

The reason underlying a tribe's or the federal government's delay in attempting to resurrect reservation status is also instructive:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive

> with tribal ownership was unfamiliar," *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.*; see also *Hagen*, 510 U.S. 399, 426, 114 S.Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen").

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343-44 (1998).

> Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. See *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1163-1164, 79 L.Ed.2d 443 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian

> settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy).

South Dakota, 522 U.S. at 325.

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, open lands that had not yet been claimed by non-Indians.

Solem, 465 U.S. at 468.

In other words, the application of a defense based on laches, acquiescence or impossibility hardly works an undue hardship on a tribe, when, at the time these Acts were passed, everyone knew their purpose was to make the reservations "disappear" and "fade" away. The fact the economics of the situation have now changed, so that tribes currently have the ability to try to resurrect the existence of long departed reservations, cannot overcome more

than a century's worth of acknowledgment that the reservations no longer exist.

As a result, the mere fact that congressional acts disposing of reservation land may be ambiguous or silent as to Congress' intent relating to diminishment or disestablishment, cannot overcome the equitable prohibition against a tribe's disruptive attempt to reinstate sovereign authority over ancient reservation land that has long since passed to and has been governed by state and local governments.

III. This Case Contains Factors Identical To Those Used By *City Of Sherrill* To Preclude The Resuscitation Of Sovereign Control.

For the same reasons the Court found equitable diminishment in *City of Sherrill*, it should find it here. The parallels are patent and application should be identical. *City of Sherrill* noted its continuity of governance by confirming that, "[f]or the past two centuries, New York and its county and municipal units have continuously governed the territory." *City of Sherrill*, 544 U.S. at 216. Similarly, Nebraska and Pender exercised 125 years of uninterrupted governance over this area. "From 1882 until 2006, the State of Nebraska consistently, and exclusively, exercised civil and criminal jurisdiction over Pender, Nebraska and its surrounding areas . without contest or objection from the Omaha Tribe of Nebraska . . or the United States." Pet. Br. 2 (citing J.A. 204, 206, 208, 364-68). In fact, "[n]either Pender nor its citizens have ever been subjected to the

jurisdiction of the Tribe." Pet. Br. 25 (citing J.A. 215-16).

City of Sherrill highlighted the non-Indian character of the land in question, finding "[t]he city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians." *City of Sherrill*, 544 U.S. at 219. The Village of Pender has a similarly non-Indian character. "Since the early twentieth century, non-Indians have comprised over 98% of the disputed area's population and the United States conveyed over 98% of the land in the disputed area to non-Indians." Pet. Br. 2 (citing J.A. 189, 215-16, 369-73). In fact, the "Tribe has no office, operates no schools, industries, or businesses in the disputed area and has not conducted any government or ceremonial activities there . has no mineral rights or other claims to land . . and the Tribe has never enforced tribal ordinances west of the railroad right-of-way." Pet. Br. 17 (citing J.A. 215-16). Just like the residents of Sherrill developed justifiable expectations of self-governance, the Nebraskans living within Pender, likewise, justifiably expect that they will continue to govern themselves through democratically-elected representatives.

Where a great period of time has elapsed since sovereign control has been exercised by the Tribe; where a State has exercised uninterrupted governance over that area the entire time; where re-creating tribal sovereign control would be unduly disruptive to a predominantly non-Indian area and population; and where justifiable expectations of self-governance exist through development of an area

under this self-governance—this Court should not countenance a tribe's attempt to rekindle the "embers of sovereignty that long ago grew cold." *City of Sherrill*, 544 U.S. at 214. Just as this Court refused to allow the Oneida Tribe from reinstating sovereign control over the Oneida's historic reservation in *City of Sherrill*, it should refuse to allow the Omaha Tribe and federal government to do so in this case.

IV. Affirmation Of The Decision Below Will Result In Severe Disruptions To Any Government, Business, And Resident Individually Located Within An Ancient Reservation.

This case is not *just* about the tribal regulation of non-Indians who operate businesses in Pender, Nebraska. This case is about the wisdom of resuscitating sovereign jurisdiction over former reservation land throughout the entire United States, land that, for generations, has been under the exclusive jurisdiction of the state and local governments, and left undisturbed by both tribal and federal interests. This case is about the executive branch's continued attempts to usurp state and local authority. This case is about disrupting the justifiable expectations developed by all who have decided to live and establish businesses on land governed by known rules—rules they had a hand in creating.

A. Courts Have Consistently Confirmed The Disruptive Effects Of Re-Establishing Sovereign Control Over An Ancient Reservation Land.

City of Sherrill warned that "[i]f [the Oneida] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, *little would prevent the Tribe from initiating a new generation of litigation* to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *City of Sherrill,* 544 U.S. at 220. (emphasis added). Disruption will abound.

The district court for the Northern District of New York, well versed in federal Indian law, came to the same conclusion:

> If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example. *See City of Sherrill*, 125 S.Ct. at 1493 n. 13. Even the lone dissenter, Justice John Paul Stevens, opined that local taxation was the "least disruptive to other sovereigns," and noted that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of

> interests obviously supports the retention of state jurisdiction in this sphere." *Id.* at 1497 n. 6, 161 L.Ed.2d 386 (Stevens, J., dissenting) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987)).

Cayuga Indian Nation of New York v. Village of Union Springs, 390 F Supp.2d 203, 206 (N.D.N.Y. 2005).

The New York District Court concluded:

> The Nation is seeking relief that is even more disruptive than non payment of taxes. The Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations.

Id.

Nearly ten years after this Court's ruling in *City of Sherrill*, the Second Circuit held: "[i]t is now well-established that Indian land claims asserted generations after an alleged dispossession are *inherently disruptive* of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility." *Stockbridge-Munsee Cmty.*, 756 F.3d at 165. (emphasis added).

Moreover, an affirmance of the non-diminishment decision of the lower court would license every tribe within the United States to do the exact same thing—attempt to reassert sovereign control at the expense of state and local governments. This *inherent disruption* will occur everywhere. This is not hyperbole. Real life examples of these disruptive effects also abound.

Both Hobart and Pender Public Schools will feel these effects, the former through the Oneida's attempts to seize sovereign control from Hobart by continuing to claim reservation status, and the latter directly through the potential insertion of Omaha sovereignty over Pender and its various municipal entities. The decision of this Court will either sanction tribal intrusions into the traditional sovereign powers of municipal entities and ensure "a new generation of litigation," or preclude this conduct, and assure municipalities, businesses, and individuals that they will be allowed to control and regulate themselves through their representative governments.

B. Re-Establishing Sovereign Control Over Ancient Reservation Land Will Result In Numerous And Varied Losses Of State Jurisdiction.

Several states, including Wisconsin, have promulgated regulations limiting a local municipality's ability to regulate land that is within a reservation. Chapter SPS 361 of the Wisconsin Administrative Code was promulgated to "protect the

health, safety and welfare of the public and employees by establishing minimum standards for the design, construction, maintenance and inspection of public buildings, including multifamily dwellings, and places of employment." Wis. Admin. Code SPS § 361.01. Despite this admirable objective, this building code does not, by its express terms, apply to "[b]uildings or structures located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member . . " Wis. Admin. Code SPS § 361.02(3)(b).

Chapter SPS 314 of the Wisconsin Administrative Code governs "Fire Prevention." However, this chapter does not apply to "[b]uildings or structures located on Indian reservation lands that are held either in trust by the United States, or in fee by the tribe or a tribal member . . . ." Wis. Admin. Code SPS § 314.01(1)(c)(3)(a).

The code section regulating "Flammable, Combustible, and Hazardous Liquids," was enacted "to provide fire and life safety through the safe storage, display, installation, operation, use, maintenance and transportation of flammable, combustible and hazardous liquids and the equipment, facilities, buildings and premises that are used to store, transfer and dispense them." Wis. Admin. Code ATCP § 93.010(1). Similarly, this safety regulation does not apply to "[f]acilities located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member . ." Wis. Admin. Code ATCP § 93.020(6)(u).

Chapter SPS 318 governs "Elevators, Escalators, and Lift Devices," and was promulgated "to establish minimum safety standards for the design, construction, installation, operation, inspection, testing, maintenance, alteration, repair, and replacement of conveyances." Wis. Admin. Code SPS § 318.1001. The Chapter does not apply to "[b]uildings or structures located on Indian reservation land that are held either in trust by the United States, or in fee by the tribe or a tribal member." Wis. Admin. Code SPS § 318.1003(1)(d)1.

The State's law related to "Erosion Control, Sediment Control and Storm Water Management," was created "to establish uniform standards and criteria for the design, installation and maintenance of erosion and sediment control practices at building construction sites and minimum performance standards for post construction storm water management on building sites . . . so as to protect the waters of the state." Wis. Admin. Code SPS § 360.01. Under Wis. Admin. Code SPS § 360.10, which governs "Governmental oversight," an annotation provides: "This code does not apply to . . buildings on Indian reservations . . . ." Wis. Admin. Code SPA § 360.10(2)(c), note.

The Wisconsin Statute entitled "Tribal Law Enforcement Officers; Powers and Duties" defines reservation lands to mean "all lands within the exterior boundaries of an Indian reservation in this state." Wis. Stat. § 165.92(1)(a). The statute goes on to state, that with some exceptions, a tribal law

enforcement officer's powers and duties may be exercised "only on the reservation of the tribe or on trust lands held for the tribe or for a member of the tribe that employs the officer." Wis. Stat.§ 165.92(2)(b). Once again, the labeling of an area as "reservation" has profound effects. The conflicts in policing jurisdiction, between various law enforcement agencies and the confusion of the public relative to that authority is well known to Hobart and will be triggered wherever the resurrection of a reservation is allowed to occur.

Every one of the above-referenced Code Sections and Statutes are designed to protect the health, safety and welfare of the public, via the local elected government, but do not apply if the land is deemed to be part of a "reservation." If an area of land is able to regain the title of "reservation," rendering all of these public protections inoperative, the disruption to state and local municipalities will be significant.

Similar to the tax levied in Pender, the Oneida have attempted to control business activity through licensing and fees. By way of example, the Oneida informed the Hobart Veterans of Foreign Wars (VFW) it must obtain a building permit from the Oneida instead of a Hobart building permit, to construct a building. The Oneida's rationale was that the VFW's fee land was on a reservation. This sort of jurisdictional dispute will continue to be experienced wherever there is an "expansion" of what can be considered reservation land.

In Hobart, the Oneida have been instructing its tribal members to reject Hobart's provision of services for the properties the Tribe contends are on its reservation, and instead select the Tribe's sanitation services. With fewer residents using services provided by Hobart, Hobart cannot benefit from certain lower "group" rates when it contracts for services, which will result in an obvious adverse financial impact on Hobart and impact its ability to provide these services to the community. This will be compounded by expansion of what is considered the "reservation."

Federal laws also greatly curtail local jurisdiction on land once it is labeled a "reservation." The Clean Water Act (CWA), 33 U.S.C. § 1251 et seq., requires NPDES permit coverage for stormwater discharges from construction, industrial and municipal sources to prevent pollutants from entering surface waters in storm runoffs. Permits are issued by the Environmental Protection Agency (EPA) or by state agencies. *See* 33 U.S.C. § 1342. The CWA grants authority to states to establish water quality standards for waters within their boundaries, to certify compliance, and to issue and enforce discharge permits. The State of Wisconsin has enacted its own federally-approved comprehensive water pollution regulatory system. EPA has stated that "NPDES permits for discharges in Indian Country are issued by EPA."

As a result, and despite the fact the Oneida Reservation in Wisconsin was long ago disestablished, the Region 5 Office of the EPA issued

draft permitting authority to the Oneida. The draft permit provided to the Oneida in Wisconsin "covers discharges of the storm water from . . the Oneida Reservation.[4]

Once again, the EPA's, and therefore the Tribe's, jurisdiction, is linked to the purported existence of a "reservation." To further illustrate the jurisdictional conflicts and confusion that result from the re-creation of a disestablished or diminished reservation, EPA granted the same draft NPDES permit to Hobart. Hobart's permit also "covers discharge of the storm water from the Oneida Reservation." *Id.* Disruption is sure.

With respect to the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq., in *Oklahoma Dept. of Environmental Quality v. E.P.A.*, 740 F.3d 185 (D.C. Cir. 2014), the U.S. Court of Appeals for the District of Columbia Circuit recently held:

> a state has regulatory jurisdiction under the Clean Air Act over all land within its territory and outside the boundaries of an Indian reservation except insofar as an Indian tribe or the EPA has demonstrated a tribe has jurisdiction. Until such a demonstration has been made, neither a tribe nor the EPA standing in the shoes of a tribe may displace a state's implementation

[4] U.S. Envt'l Protection Agency, Public Notice of Draft NPDES Permits to discharge into waters of the United States, http://www3.epa.gov/region5/water/npdestek/pdfs/pnofwims4prmts.pdf (last accessed 11/19/15).

> plan with respect to a non-reservation area of the state. We therefore grant Oklahoma's petition for review and vacate the Indian Country NSR Rule with respect to non-reservation Indian country.

Id. at 195. The Court also noted that the Oklahoma Department of Environmental Quality sought review of a final rule promulgated by the EPA "establishing a federal implementation plan for the attainment of national air quality standards in 'Indian country.'" *Id.* at 187. The Court further stated:

> "[j]urisdiction to implement the Clean Air Act lies initially in either a state or an Indian tribe. The EPA may in certain circumstances implement a federal program in Indian country, see 42 U.S.C. § 7601(d), but when it does so, in our view, it is subject to the same jurisdictional limitations as the tribe in whose shoes it stands. Because the EPA requires a tribe to show it has jurisdiction before regulating Indian country outside a reservation, yet made no demonstration of tribal jurisdiction before itself regulating those areas, we hold the agency was without authority to displace Oklahoma's state implementation plan in non-reservation Indian country."

Id. In other words, had the land at issue in *Oklahoma Dept. of Environmental Quality* been confirmed to have been within a "reservation," the State would have lost jurisdiction.

Pender Public Schools' interest is also manifest. Issues related to self-governance and regulation of activities on reservation land will necessarily involve operation of public school districts on reservation land. Recent cases show this to be the case. In *Red Mesa Unified School District v. Yellowhair*, No. CV–09–8071, 2010 WL 3855183 (D. Ariz. Sep. 28, 2010), the Red Mesa and Cedar School districts, "which are nonmembers of the Navajo Nation by virtue of their status as Arizona political subdivisions, [] challenged the authority of the defendants to invoke Navajo tribal law to review their personnel decisions." *Id.* at *2. While the court found the "Navajo Nation has no regulatory or adjudicative jurisdiction over Red Mesa and Cedar's employment-related decisions," the trend toward assertion of jurisdiction is evident. *Id.* at *5.

Similarly, in *Belcourt Pub. Sch. Dist. v. Davis*, 997 F.Supp.2d 1017 (D. N.D. 2014) (aff'd in part and rev'd in part), a local school district was forced to engage the courts and incur legal expenses to resist a tribe's attempts to assert its jurisdiction. "The School District commenced these actions, seeking a declaration that the tribal court lacks jurisdiction over the School District and its employees." *Id.* at 1018. In that case, the court found the tribe did have jurisdiction." *Id.* Although the Eight Circuit Court of Appeals recently reversed that decision, the court did not foreclose the possibility of a tribe attempting to assert its jurisdiction in other cases. *Belcourt Pub. Sch. Dist. v. Davis*, 786 F.3d 653 (8th Cir. 2015); *See also Fort Yates Public School Dist. No. 4 v. Murphy*

ex rel. C.M.B., 786 F.3d 662 (8th Cir. 2015) (reversing district court decision agreeing to tribal jurisdiction over public schools).

So, while some lower courts have found the existence of tribal jurisdiction in public school cases and some have not, the trend has and continues to be the assertion of tribal sovereignty over the operation of school districts on reservation land. The inclusion of Pender Public Schools into the reservation, after generations of uninterrupted self-governance, will provide the Omaha Tribe the leverage to continue this national trend. The school district will be faced with legal expenses it simply cannot afford. [5] Additionally, like anyone, Pender Public Schools wants accountability through democratically-elected officials, judges, and representatives, who are

---

[5] The threat of protracted and expensive litigation over these issues is very real. Constant legal battles over jurisdiction and regulatory authority are hard on small municipalities like Pender and Hobart which usually do not have the economic resources to fight these battles, despite their obligation to assert jurisdiction for the benefit of the communities they represent. A comparison between the 2015 budgets for Hobart and the Oneida highlights the disproportionate resources between the entities. Hobart has total budgeted expenditures of $7,935,705.00 compared to the Oneida's $409,579,523.00 2015 budget. See 2015 Village of Hobart Operating Budget, adopted Nov. 25, 2014, http://www.hobart-wi.org/ (follow "Finance and Budget", then "Annual Village Operating Budget") (last accessed 11/19/15); and Oneida Tribe of Indians of Wisconsin, Resolution and Statement of Effect FY2015 Budget, http://oneidaeye.com/wp-content/uploads/2015/01/OTIW-FY2015-Resolution-Statement-of-Effect.pdf (last accessed 11/19/15)

selected through open elections—not by a completely unfamiliar justice and legal system that precludes the ability of a non-Indian to have any say.

Additionally, the aggrieved businesses who have been assessed with a liquor tax in Pender will want to move to a locale where they are not taxed by multiple sovereignties. Other current and prospective businesses will fear a similar tribal tax will be assessed against them. With the potential for additional taxes, Pender becomes an undesirable place to create and maintain a business, and with less business, and fewer jobs, less revenue will exist to fund the Pender Public Schools. This will occur even before the Omaha Tribe begins the process to have land within the Village of Pender placed into trust and off the tax rolls, under the IRA.

Hobart and Pender are not alone in experiencing these ever-escalating attempts to expand tribal control over fee land within a purported reservation. In 2010, the Standing Rock Sioux Tribe, located in North and South Dakota issued a letter to non-tribal business owners operating on their own fee land within the reservation, indicating a new tribal code "requires any person or entity that engages in or intends to engage in Business on the Standing Rock Reservation to obtain a Business License form the Tax Department."[6] In a related Public Notice, that a

---

[6] Standing Rock Sioux Tribe Tax Department, Letter to Business Owners, http://tax.standingrock.org/data/upfiles/programs/files/Dear%20Owners%20Revised.pdf (last accessed 11/20/15).

Tribe claimed "it is unlawful for any person or entity to conduct business within the Standing Rock Reservation without a valid Business License." The letter and Public Notice informed the non-tribal businesses that they were mandated to obtain a business license from the Tribe to operate, even on their own fee land. The Tribe supported its mandate by citing Section 16-201 of the Tribe's Constitution, in which the Tribe granted itself the ability to "levy license fees on members and non-members of the tribe who conduct business within the Standing Rock Reservation."

On April 21, 2015, the Confederated Tribes and Bands of the Yakama Nation informed the City of Toppenish, Washington, that the Tribe had "identified" the City as "a business operating within the jurisdiction of the Yakama Nation," citing to the Confederated Tribes and Bands of the Yakama Nation – Tribal Codes and Resolutions § 30.02.07. Toppenish is not the only entity the Yakama Nation is attempting to regulate and tax. On June 1, 2015, the Yakima Herald reported: "[I]n an apparent effort to assert sovereignty and raise revenue, the Yakama Nation is now requiring all nontribal business and municipalities on the reservation to obtain a tribal business license, at an annual $205 cost, in order to operate."[7] Once again, this demand was based upon the claimed existence of a reservation.

---

[7] Phil Ferolito, Yakamas seek operating licenses from non-tribal entities, Yakima Herald (Jun. 1, 2015) http://www.yakimaherald.com/news/local/yakamas-seek-operating-licenses-from-nontribal-entities/article_309c94fc-079a-11e5-8799-c3ac88f80414.html.

It is far from speculation that the Pender Public Schools will also receive a notice that it has been "identified" as a business operating on a reservation and is therefore "required" to obtain a license from the Omaha Tribe to continue its operations, a license that comes with fees, curriculum, tribal hiring preferences and other mandates.

These examples of various tribes' attempts to regulate non-tribal members and local municipalities—because they live on or conduct business within a reservation—are not made to suggest such regulations will always be inappropriate. These examples merely emphasize the significant ramifications resulting from a determination that an area of land is still considered to be within a "reservation." Those ramifications may be far less significant, and more appropriate, in an area that has always been treated as a reservation, over which tribal and federal jurisdiction has never been abandoned. However, the disruptive nature of such actions cannot be overstated in areas such as Pender, Nebraska, where none of the occupants of the historic reservation ever dreamed their land could somehow revert back to being part of a current reservation, and thereby subject them to a tribal sovereignty that has never previously been known.

CONCLUSION

The Eighth Circuit ignored this Court's ruling allowing for equitable diminishment as explained in *City of Sherrill*. Additionally, as the Petitioners argue, the Eight Circuit misapplied this Court's

diminishment test as explained in *Solem*. Both of these errors require reversal of the lower court's ruling and a finding that the Omaha Reservation was diminished.

Respectfully submitted,

FRANK W. KOWALKOWSKI
COUNSEL OF RECORD
DILLON J. AMBROSE
DAVIS & KUELTHAU, S.C.
318 S. Washington St.
Suite 300
Green Bay, WI 54301
Main: 920.435.9378
Direct: 920.431.2221
fkowalkowski@dkattorneys.com
Counsel for Amicus Curiae

November 23, 2015